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FOR

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1940.

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MEMORANDA.

1940.

Jan. 16. SIR GEORGE ARTHUR HARWIN BRANSON, *lately a Justice of the High Court of Justice, King's Bench Division, was, by His Majesty's command, appointed a Member of His Majesty's Most Honorable Privy Council.*

May 8. *This day* SIR TERENCE JAMES O'CONNOR, M.P., *His Majesty's Solicitor-General, died at* 19, *Chesham Street, London, S.W., aged* 49.

May 12. THE RIGHT HON. VISCOUNT CALDECOTE *having resigned the office of Lord Chancellor of Great Britain, His Majesty in Council was this day pleased to deliver the Great Seal to* THE RIGHT HON. SIR JOHN ALLSEBROOK SIMON, G.C.S.I., G.C.V.O., *who thereupon kissed hands on appointment and took his place at the Board accordingly.*

May 20. THE RIGHT HON. SIR WILLIAM ALLEN JOWITT, K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Terence James O'Connor, M.P., deceased.*

May 21. *The dignity of a Viscounty of the United Kingdom was conferred upon* THE RIGHT HON. SIR JOHN ALLSEBROOK SIMON, G.C.S.I., G.C.V.O., *Chancellor of Great Britain, by the name, style and title of Viscount Simon, of Stackpole Elidor, in the County of Pembroke.*

Oct. 12. THE RIGHT HON. THOMAS WALKER HOBART VISCOUNT CALDECOTE, C.B.E., *was appointed to the Office of Lord Chief Justice of England in the place of the Right Hon. Lord Hewart, resigned.*

Oct. 31. *The dignity of a Viscounty of the United Kingdom was conferred upon* THE RIGHT HON. BARON HEWART, *lately Lord Chief Justice of England, by the name, style and title of Viscount Hewart of Bury, in the County Palatine of Lancaster.*

Nov. 1. THE RIGHT HON. SIR HENRY SLESSER *resigned his office as a Lord Justice of Appeal owing to ill-health.*

Nov. 1. THE HON. SIR WALTER GREAVES-LORD *resigned his office of a Judge of the High Court of Justice, King's Bench Division, owing to ill-health.*

ERRATA.

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Samuel v. *Adelaide Club, Ld.* [1934] 2 K. B. 69.
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Sevenoaks U. D. C. v. *Twynam* [1929] 2 K. B. 440.
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Smith v. *Cammell, Laird & Co., Ld.* [1938] 2 K. B. 700.
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Overruled. Cohen *v.* Cohen **H. L. (E.) 631**

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21 & 22 Geo. 5, c. 8 (*Copyright Amendment*), s. 2 (*v.*); s. 3. Francis Day & Hunter, Ld. *v.* Twentieth Century Fox Corporation, Ld. and Others - - - **J. C. 112**

1937.

Provincially Guaranteed Securities Proceedings (*Alberta*), c. 11. Lethbridge Northern Irrigation District Trustees and Another *v.* Independent Order of Foresters, Att.-Gen. for Canada, Intervener. Rex *v.* Independent Order of Foresters; Att.-Gen. for Canada, Intervener **J. C. 513**

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STATUTES—*continued.*

Provincial Securities Interest (*Alberta*), c. 13. Lethbridge Northern Irrigation District Trustees and Another *v.* Independent Order of Foresters; Att.-Gen. for Canada, Intervener. Rex *v.* Independent Order of Foresters; Att.-Gen. for Canada, Intervener - - **J. C. 513**

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1928.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

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pplied. R. *v.* PORTER. [1949]
All E.R. 646.

[HOUSE OF LORDS.]

MILNE AND OTHERS . . . . APPELLANTS; H. L. (E.)*

AND

COMMISSIONER OF POLICE FOR CITY OF LONDON . . . . RESPONDENT.

1939
April 20, 21, 24;
June 27.

Gaming—Betting house—Public telephone at premises used for communicating bets to bookmakers—"User of premises"—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

Sect. 1 of the Betting Act, 1853, provides that "No house, "office, room, or other place shall be opened, kept, or used for "the purpose of the owner, occupier, or keeper thereof, or any "person using the same . . . . or of any person having the care "or management or in any manner conducting the business "thereof betting with persons resorting thereto . . . ." :—

Held, that the mere fact that a bookmaker from his own premises uses the public telephone to make bets with the members of a club does not constitute a user by him of the club premises so as to bring the owner, occupier, or keeper thereof within the prohibition of the section.

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* *Present:* LORD MAUGHAM L.C., LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

H. L. (E.)
1939
MILNE
v.
COMMISSIONER OF
POLICE FOR
CITY OF
LONDON.

Per Lord Maugham L.C. The user of premises within the meaning of the section involves that the betting with persons resorting thereto is carried out by the owner, occupier or keeper, or by a person using the place in a popular sense who, if not present by himself or by some agent or nominee, is permitted to exercise, or in fact exercises, some de facto control or some privilege or right over the place in question, not being a control, privilege or right possessed by the public at large.

Per Lord Atkin. An indictment for the offence created by s. 1 of the Betting Act, 1853, should state the name of the person alleged to have used the premises for betting purposes. If the name is unknown, the fact should be stated.

Powell v. *Kempton Park Racecourse Co., Ld.* [1899] A. C. 143 considered; *Samuel* v. *Adelaide Club, Ld.* [1934] 2 K. B. 69 distinguished; *Young* v. *Darrah* 1929 S. C. (J.) 17 approved.

Per Lord Atkin. *Rex* v. *Deaville* [1903] 1 K. B. 468, and the cases that followed it, were wrongly decided, so far as they laid down the test of permission by the occupier.

Decision of the Court of Criminal Appeal reversed.

APPEAL from a decision of the Court of Criminal Appeal on the certificate of the Attorney-General that the decision involved a point of law of exceptional public importance.

The appellants were charged on indictments alleging a conspiracy to keep a betting house, and the keeping of a betting house contrary to s. 1 of the Betting Act, 1853, and one of the appellants was charged with assisting in keeping a betting house contrary to s. 3 of the Act. (1)

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(1) Betting Act, 1853, s. 1: "No house, office, room, or other "place shall be opened, kept, or "used for the purpose of the owner, "occupier, or keeper thereof, or "any person using the same, or "any person procured or employed "by or acting for or on behalf of "such owner, occupier, or keeper, "or person using the same, or of "any person having the care or "management or in any manner "conducting the business thereof "betting with persons resorting "thereto; or for the purpose of "any money or valuable thing "being received by or on behalf "of such owner, occupier, keeper, "or person as aforesaid as or for "the consideration for any assur-"ance, undertaking, promise, or "agreement, express or implied, "to pay or give thereafter any "money or valuable thing on any "event or contingency of or "relating to any horse race, or "other race . . . . or as or for "the consideration for securing "the paying or giving by some "other person of any money or "valuable thing on any such event "or contingency as aforesaid; and "every house, office, room, or "other place opened, kept, or used "for the purposes aforesaid, or "any of them, is hereby declared "to be a common nuisance and "contrary to law."

The facts out of which the prosecution of the appellants arose were in the main agreed by the parties. They are set out in full in the speech of Lord Wright, and were briefly as follows :—

The appellant Milne at the time of the prosecution was the tenant of the first floor of premises, 72, Bartholomew Close, in the City of London, where she carried on the business of a club known as the Byculla Club. The appellant Boundford, her stepbrother, had for two years before the prosecution assisted her in the management of the club, of which he also was a member. The club had about 600 members, who paid a yearly subscription of 2*s.* 6*d.* until January, 1938, afterwards reduced to one shilling. Meals and refreshments, including alcoholic liquor, could be obtained at the club, which opened at 11 o'clock in the morning and closed at 7 o'clock at night, and there were facilities for playing darts. The club premises consisted of a club room (in which was a bar), a kitchen, and two other rooms. One of those rooms was extensively used by the club members for making credit bets by telephone, mostly with a bookmaker named Payne, but also with other bookmakers. There were two coin-operated telephones on the club premises, one in the passage and the other in the room above described as extensively used for making bets by telephone. Both telephones were rented by the appellant Milne. The bookmaker Payne had his office at 43, Little Britain, some fifty yards from the club premises. Members made credit bets with him by telephone from the club to his office. Two years before this prosecution, Payne, who

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Sect. 3: "Any person who "being the owner or occupier of "any house, office, room, or other "place, or a person using the "same, shall open, keep, or use "the same for the purposes hereinbefore mentioned, or either of "them; and any person who "being the owner or occupier of "any house, room, office, or other "place shall knowingly and wilfully permit the same to be "opened, kept, or used by any "other person for the purposes "aforesaid, or either of them; and "any person having the care or "management of or in any manner "assisting in conducting the business of any house, office, room, "or place opened, kept, or used "for the purposes aforesaid, or "either of them shall" be liable to be convicted.

had been a member of the club for over three years, rented two rooms on the second floor of 72, Bartholomew Close, immediately above the club premises, and two months before the prosecution he engaged a member of the club named Green as a settlement clerk at 30s. a week, and installed him on the said second floor. Those rooms rented by Payne had an ordinary post office telephone in them, which was rented by him. There were telephone communications by Payne at 43, Little Britain to Green on the said second floor, informing Green of the amounts won or lost on the betting transactions made by telephone from the club with him (Payne) at Little Britain. Green on occasions left the keys of the rooms with the appellant Milne for safe custody when he went out, and Milne was permitted to store bottles in one of them. None of the appellants had any measure of control over Payne's premises on the second floor. No ready money betting took place on the club premises or on the second floor.

Observations were kept on the club premises between May 18, 1938, and June 24, 1938, and it was established that many members while at the club premises made bets by telephone with Payne at his office, and on no occasion was a single stake heard to exceed 10s. The amounts won or lost by members upon these bets were communicated by Payne to Green by telephone to his room on the second floor above the club premises, and after the day's racing was over members settled their accounts with Green in the latter's room, although on occasion Green came down to the club premises and settled with Mrs. Milne the winnings or losses on bets which she had previously made with Payne by telephone to his office at Little Britain.

The appellants Milne and Boundford were present on the premises at all material times, and were aware of the arrangements between Green and Payne to facilitate the payment after the races of losses and winnings upon bets made by members of the club. The appellant Leonard, who was a member of the club, was also aware of this arrangement. He attended regularly at the club on Mondays to Fridays inclusive during racing hours, and used to make up to twelve bets a day by telephone with Payne at his office, 43, Little Britain, usually for himself, but occasionally for somebody other than himself. The appellants Milne and Boundford also made bets by telephone with Payne at his office, both for themselves and for others.

Documents in Green's possession established that the daily stakes in respect of bets made by members of the club occasionally exceeded 40*l.*, and averaged 20*l.* During the three weeks prior to June 24, the appellant Leonard paid 19*l.* 19*s.* 2*d.*, and the appellant Milne, mainly on behalf of others, paid 25*l.* 12*s.* 5*d.* During the observation each appellant was heard in the club room to refer to the making of bets or to the result of races or bets. There was no evidence of any express agreement between Payne and any of the appellants that any betting facilities should be provided. It was not, however, denied that all the appellants knew and acquiesced in the method by which the betting and settling was carried on, and that it had only so been carried on for two months prior to May, 1938.

Payne in his evidence denied that the mere fact that a man was a member of the Byculla Club was a sufficient qualification to open an account with him so that he could telephone his bets from the club. He said he would meet the member, perhaps at the club, and if satisfied with him, would accept his bets by telephone from the club.

The appellant Milne, who had an account, would often, according to the evidence, put through the telephone bets for other members who had no account in their own names, as did also the appellants Leonard and Boundford.

At the trial, the judge, in the course of his summing-up to the jury, said: "Is Payne a person using the said premises "in the sense I have tried to point out to you, for the purpose "of persons betting with persons resorting thereto; that is "to say, is he in the description of forbidden persons? I hope, "also, I have made that clear to you, that in order that he "should come within that class, you must be satisfied that "there was some definite arrangement, or understood definite "arrangement, between Milne and himself, that he should be "there for that purpose. There is no doubt that the mere "fact that the bets were telephoned does not take the case "outside the Act. The intervention of the telephone does "not eliminate the user and take the bookmaker outside the "forbidden persons. You can see that for yourselves, because "what is the position supposing the bookmaker was present, "and that what was said on the telephone was said to him "in person? Then, clearly, the premises would be used for "the purpose of making bets. The essential parts towards "the completion of the bet occurred at the premises."

The jury having convicted the appellants, the latter appealed to the Court of Criminal Appeal. That Court dismissed the appeal, holding that there was no misdirection by the judge, and that his summing-up was correct.

The appellants appealed to this House.

A. T. Denning K.C. and *H. C. Leon* for the appellants. Sect. 1 of the Betting Act, 1853, creates two separate and distinct offences, one for keeping or using a place for the purpose of betting with persons resorting thereto, and the other for the purpose of receiving deposits on bets: *Bond* v. *Plumb.* (1) The question in this case is whether communications by means of a public telephone by a bookmaker in his office with persons in the club, for the purpose of bets, constitutes a user of the club premises within the meaning of the section. We submit that "betting" in the section means the actual making of bets on the premises, and does not mean the receiving of winnings or the payment of losses in respect of bets previously made: *Bradford* v. *Dawson.* (2) The words "persons resorting thereto" mean persons physically resorting to the premises: *Taylor* v. *Monk* (3); and it follows that a bet made by means of the public telephone is not in law the same, nor can it have the same result, as a bet made between persons face to face on the particular premises. A person betting on a racecourse is not using it, in the sense of the statute, by merely making bets with persons whom he

(1) [1894] 1 Q. B. 169.
(2) [1897] 1 Q. B. 307.
(3) [1914] 2 K. B. 817, 821.

sees there. To make him a person " using " the place there must be something in the nature of control by him of some specific part, e.g., by erecting a tent or the like: *Powell* v. *Kempton Park Racecourse Co., Ld.* (1)

[LORD WRIGHT. Here there was a defined place. The question is, was it " used " by Payne for the purpose of making bets ?]

For user, there must be physical control by the man himself: see per Channell J. in *Mackenzie* v. *Hawke.* (2) As the same judge said in *Brown* v. *Patch* (3) " the statute seems "clearly to be directed against betting places, not against "betting persons " ; see also *Reg.* v. *Worton* (4) ; *Liddell* v. *Lofthouse* (5) ; *McInaney* v. *Hildreth* (6) ; and *Reg.* v. *Humphrey.* (7) In all these cases there was a particular place to which the bookmaker physically resorted for the purpose of betting with persons there. In the Scottish case of *Young* v. *Darrah* (8) the right test was applied, namely, whether the shed there in question where the betting took place was a " place " within the meaning of the Betting Act. If a bookmaker, as was the case here, sits in his office and uses the telephone for making bets with persons in another place—in this case in the club—he is " using " his office, and is not " using " the premises where the persons are with whom he is communicating. It follows, therefore, that there being no " user " of the club premises for betting the conviction of the appellants was wrong. *Rex* v. *Deaville* (9) was also cited.

J. G. Trapnell K.C. and *Edward Clarke* for the respondent. The arrangement between Payne, the bookmaker, and the appellants, who had control of or assisted in the management of the club, involved special facilities being accorded for betting transactions being entered into. The term " user " does not necessarily require the physical presence of the bookmaker on the premises, nor need the whole transaction take place there. In *Stoddart* v. *Hawke* (1), Channell J. said that " the statute was much considered in *Powell* v. *Kempton* "*Park Racecourse Co., Ld.* (2), and it was there pointed out, "particularly by Lord James of Hereford, that what was "prohibited was not the mere carrying on of a business of "betting, but the localization of such a business." In this case the business was localized in the club premises: *Samuel* v. *Adelaide Club, Ld.* (3) If any material part of the betting transactions is carried out in the club—as it was here—there is a " user " of the club premises within the meaning of the Act. We rely on the presence of the man Green as part of the business arrangement, seeing that he collected the money on the club premises. The jury was properly directed and the case merely involved a question of fact which was answered correctly.

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(1) [1899] A. C. 143.
(2) [1902] 2 K. B. 216, 224.
(3) [1899] 1 Q. B. 892, 898.
(4) [1895] 1 Q. B. 227.
(5) [1896] 1 Q. B. 295.
(6) [1897] 1 Q. B. 600.
(7) [1898] 1 Q. B. 875.
(8) 1929 S. C. (J.) 17.
(9) [1903] 1 K. B. 468.

A. T. Denning K.C. replied.

The House took time for consideration.

1939. June 27. LORD MAUGHAM L.C. My Lords, this is an appeal from the decision of the Court of Criminal Appeal of December 19, 1938, in the matter of the convictions of Florence Milne, John Charles Leonard and Howard Boundford, under the Betting Act, 1853. The appeals of those persons to the Court of Criminal Appeal were dismissed, and the persons convicted have each of them presented petitions of appeal, the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance having been duly obtained.

The facts will be carefully stated by my noble and learned friend, Lord Wright, whose judgment I have had the advantage of reading, and I will not detain your Lordships by going through them. It will be sufficient to say that the indictments were based on a conspiracy to keep a betting house, and on the keeping of a betting house, contrary to s. 1 of the Betting Act, 1853, and one of the appellants, namely the appellant Boundford, was charged with assisting in keeping a betting house, contrary to s. 3 of the Betting Act, 1853. The trial took place before Judge Beazley and a jury. The three appellants were found guilty. The appellant Milne was sentenced to pay a fine of 50*l*, and the appellants Boundford and Leonard were sentenced to pay a fine of 25*l*. The appeal to the Court of Criminal Appeal was based on the contention that the learned judge had given a wrong decision on a question of law, that there had been certain misdirections, and that there had been a miscarriage of justice. In the Court of Criminal Appeal, which consisted of the Lord Chief Justice and Charles and Humphreys JJ., it was held that there was no ground for interfering with the convictions, and the appeal was dismissed.

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(1) [1902] 1 K. B. 353, 360.

(2) [1899] A. C. 143.

(3) [1934] 2 K. B. 69.

The facts may be summarized by saying that the appellant Milne was the tenant of the first floor of 72, Bartholomew Close, in the City of London, where she carried on the business of the Byculla Club, which was largely used by the members for the purpose of betting ; that the appellant Boundford had assisted her in the management of the club, of which he was a member ; and that the appellant Leonard, who was also a member of the club and made many bets whilst there, was alleged to be aware of an undefined arrangement made between the appellants Milne and Boundford for facilitating the betting of members. The fee for membership was a shilling a year. The bookmaker, with whom most of the bets by members were made, was one Payne. There were two public telephones, and the bets of the members were made with Payne, who did not himself come into the premises for the purpose of betting, by the use of one or other of those telephones. There was no ready-money betting on the club premises. A clerk, employed by Payne, one Green, occupied some premises taken in the name of Payne above the club premises. The amounts won or lost by members upon the bets by telephone were communicated by Payne to Green by a telephone to Green's room, and after the day's racing was over members settled their accounts with Green in the rooms on the second floor, although on occasions Green came down to the club premises and settled those matters with the appellant Milne.

This summary is not in any way intended to represent the whole of the case against the appellants, for which reference should be made to the judgment of my noble and learned friend; and I also accept and gratefully adopt his statements as to the indictment, the directions given to the jury by Judge Beazley, the decision of the Court of Criminal Appeal, and the two main objections to the summing-up. For the purpose of my remarks I propose to assume that the club premises were used mainly as a betting club; that all three appellants were fully aware of the methods employed for facilitating betting by members, but, on the other hand, that the bets were made on a public telephone with Payne (and sometimes with other bookmakers) who did not come to the club premises for that purpose. I should add that the learned judge, on the authority of a case which I shall consider later, *Samuel* v. *Adelaide Club* (1), was of opinion that the use of the telephone by Payne or others for the purpose of making bets with members was such a use of the club premises as would justify the jury in finding that the position was precisely the same as if the bookmaker was actually on the premises, or was standing at the door of the club and making bets with the members. The Court of Criminal Appeal adopted the same view. One of the questions which your Lordships have to decide is whether this view, which formed part of the directions to the jury, was correct.

In the present instance we are dealing with a case where there was " an office, room or other place used for the purpose " of betting taking place with " persons resorting thereto." The rooms, as I have said, were a part of 72, Bartholomew Close, and the " persons resorting thereto " were the members of the Byculla Club, which occupied those premises. The question, " what is a place ? ", which in other cases has occasioned a good deal of doubt, does not arise here. The difficult question is in relation to the activities of the bookmaker Payne. It is beyond dispute that betting is not an unlawful act and that no offence is committed by opening, keeping, or using a club for the purpose of the members betting with each other. To justify a conviction under ss. 1, 3 and 4 of the Act the place must be opened, kept, or used for one of the two purposes mentioned in s. 1. The first purpose is the one asserted to apply here, that is, it is said that the place was open, kept, or used for the purpose of certain specified persons betting with (in this case) the members of the club. These persons must be in one or more of the following descriptions, or categories: "(1.) the owner, (2.) occupier, or (3.) "keeper thereof, or (4.) *any person using the same*, or (5.) "any person procured, or (6.) employed by, or (7.) acting "for or on behalf of such owner, occupier or keeper or person "using the same, or (8.) of any person having the care or management, or (9.) in any manner conducting the business "thereof." (I have supplied the numbers for the sake of clarity, and have italicized the words which are said to apply.)

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(1) [1934] 2 K. B. 69.

It is alleged for the prosecution that the bookmaker Payne "used" the club rooms for betting with the members who were there, and the question is, did he so use them within the meaning of the word "use" in that part of s. 1 of the Act? To avoid misconception I will add that the difficulty is not as to the word "use" in the preliminary words "shall be opened, "kept, or used," as to which there is no trouble in the present case, but as to the words employed in the description of the first purpose mentioned in the section, namely, in the sentence "for the purpose of the owner, occupier, or keeper thereof "or any person using the same." In what follows I am mainly confining my remarks to the meaning of "person using the same" in this part of the section.

The Betting Act is certainly not a model of good drafting, and a generation of judges has been puzzled by it. The numerous decisions in regard to the sections cannot altogether be reconciled, and, on the other hand, it is, I think, impossible for this House wholly to disregard them and to start de novo. It is, moreover, plain that we are bound to follow the decision of this House in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1), if and in so far as it applies.

(1) [1899] A. C. 143.

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It may be useful to attempt a simplification of the first and the third sections of the Act. For that purpose I shall employ the word "place" for the words "house, office, room or other place," the word "used" for "opened, kept, or used," and the words "designated persons" for the nine classes or categories I have above mentioned. With these abbreviations, ss. 1, 3 and 4 would in substance run as follows: Sect. 1.—No "place" shall be "used" (1.) for the purpose of any designated person betting with persons resorting to such place; or (2.) for the purpose of any money or valuable thing being received by or on behalf of any of the designated persons (*a*) as consideration for any promise or agreement to pay thereafter any money or valuable thing on any event relating to sport or exercise, or (*b*) as consideration for the paying or giving by some other person of any money or valuable thing on any such event. (The "places" so employed are then declared to be common nuisances and contrary to law.) Sect. 3.—Any person, being an owner or occupier of any "place" or a person using the same, who shall "use" the same for either of the purposes mentioned, and any person being the owner or occupier of any "place," who shall knowingly permit the same to be "used" by any other person for either of the purposes; and any person having the care or management of or assisting in conducting the business of a "place" "used" for either of the purposes shall on summary conviction be liable to a fine of 100*l*. or six months' imprisonment. Sect. 4.—Any person, (*a*) being an owner or occupier of any "place" "used" for either of the purposes mentioned, or (*b*) acting on behalf of such owner or occupier, or (*c*) having the care or management or assisting in conducting the business thereof, who receives money or any valuable thing as a deposit on any bet on condition of paying any money, etc., on the happening of any event or contingency relating to any race or any fight, game, sport or exercise, or as consideration for any promise or agreement to pay money on such event or (*d*) giving any acknowledgment or receipt purporting to entitle the bearer to receive money on any event, shall be liable to a fine of 50*l*. or three months' imprisonment.

Some points on these somewhat artificial provisions are worth noting. Sect. 1 deals with the user of the place for one of two defined purposes, and the user is made a common nuisance and illegal. The sanctions are in ss. 3 and 4 and they both refer to the user of the place for one or other of the purposes mentioned; but the sanctions are more severe under s. 3 than under s. 4. It may be noted in passing that under s. 3 the persons mentioned in six of the categories above mentioned (the owner, occupier, keeper, the person using, the person managing, and the person conducting the business) are made liable, but it omits the persons procured, and the persons employed on behalf of the owner, etc., and the agent of the manager. Sect. 4 inflicts the lower penalty on all the nine classes or categories who receive money, etc., as a deposit or on a promise to pay, or who give an acknowledgment or receipt.

As I have already said, the question arises whether Payne was a " person using " the place, i.e., the club premises; and, in order to answer this question, it is necessary to determine as a matter of construction what meaning is to be given to the word " using," having regard to its association with the words " owner, occupier, or keeper " of the place. The "person using " may clearly procure or employ, or appoint an agent to bet; but that does not take us very far. It is also clear (from s. 3) that a person using the place may use it for the purpose of some person using the place betting with persons resorting thereto, and that the owner or occupier may permit the place to be used by any other person for the purpose of some person using the place betting with persons resorting thereto. The constant repetition of the word "using "—not always it would seem in the same sense—is one of the circumstances that has given rise to decisions which are not very easy to reconcile.

The important case of *Powell* v. *Kempton Park Racecourse Co., Ld.* (1) must now be considered. It did not, of course, arise on a prosecution under the terms of the Betting Act. The matter was brought before this House by means of a

(1) [1899] A. C. 143.

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friendly action brought by a shareholder in the company against the company, for the purpose of obtaining a decision as to the legality of the betting carried on in an uncovered enclosure of about a quarter of an acre adjacent to the racecourse, to which enclosure the public, including bookmakers, were admitted on payment of a small entrance fee. The injunction was to restrain the use of that part of the company's premises for what was alleged to be an illegal purpose, and the question before this House was whether the purpose, for which the enclosure was in fact being used, was illegal. If it was, the injunction ought to have been granted ; if not, the action ought to have been dismissed. It may be mentioned that there were one or two hundred professional bookmakers accustomed to attend in the enclosure, and from five hundred to two thousand members of the public were also there, most of whom entered the enclosure for the purpose of backing horses with the bookmakers. The bookmakers, who were accompanied by their clerks, did not use any apparatus, such as a desk, stool, umbrella or tent, but particular bookmakers were usually to be found in or near the same part of the enclosure calling the odds to attract backers. This use of the enclosure was known to, and permitted by, the company.

The trial judge was Lord Russell of Killowen C.J., who upon the authority of the case of *Hawke* v. *Dunn* (1) gave judgment for the plaintiff and granted the injunction. The Court of Appeal, consisting of Lord Esher M.R. and five Lords Justices, allowed the appeal (Rigby L.J. dissenting) ; but in the elaborate judgments the main point was taken to be whether the enclosure, to which I have referred, could be described as a place within the meaning of ss. 1 and 3 of the Betting Act, 1853. In this House the appeal was dismissed, and *Hawke* v. *Dunn* (1) was overruled. There were only two speeches with full reasons for the decision of the noble Lords, the elaborate speech of Lord Halsbury, and a shorter one by Lord James of Hereford. The former was concurred in as regards the conclusion by six Lords. Lord Watson stated that he was of the same opinion

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(1) [1897] 1 Q. B. 579.

"for substantially the same reasons." Lord Macnaghten and Lord Morris simply concurred in the motion proposed by the Lord Chancellor. Lord Shand was of the same opinion. Lord James of Hereford concurred in the proposed motion on the ground that the enclosure was not within the word "place" upon the true construction of the sections already referred to. Lord Herschell, who was present at the hearing, and who saw the judgment of the Lord Chancellor but did not live to hear it delivered, had concurred in the views expressed by the Lord Chancellor. The Lord Chancellor of Ireland, who had assisted at the hearing, said that he also agreed with the judgment proposed to the House. On the other hand, Lords Hobhouse and Davey delivered dissenting judgments.

It should be noted at the outset that Lord Halsbury stated that he did not think that the important question was—what is a "place." He said that any place, which is sufficiently definite and in which a betting establishment might be conducted, would satisfy the words of the statute. From his speech it seems that his view as to the true ground on which the case fell for decision was the meaning to be given to the word "use" or "using" in the phrase "for the purpose of "the owner, occupier or keeper thereof, or any person using "the same betting with persons resorting thereto"; and, after criticizing the reasoning of Lord Hobhouse and Lord Davey, he said this (1): "It is not the repeated and designed, "as distinguished from the casual or infrequent, use which "the employment of that word imports here, but the character "of the use as a use by some person having the dominion "and control over the place, and conducting the business of "a betting establishment with the persons resorting thereto." A little later he says this (2): "It seems to me clear that the "thing against which the enactment is levelled is any place "used in the sense I have explained. There must be a "business conducted, and there must be an owner, occupier, "manager, keeper, or some person who, if these designations "do not apply to him, must nevertheless be some other "person who is analogous to and is of the same genus

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(1) [1899] A. C. 160.

(2) Ibid. 161.

"as the owner, keeper, or occupier, who bets or is willing to "bet with the persons who resort to his house, room, or other "place. In this view it is not an offence under this Act of "Parliament to allow persons to assemble for the purpose of "betting with each other; there is, upon this hypothesis, no "business being conducted at all. The different betting "people, or each individual bettor, is conducting his own "business, and doing it in a house used indeed, but only "used, just as he might do it on the racecourse or on the high "road. There is no betting establishment at all, and there "is no keeper of one."

It is important to note that Lord Halsbury expressed strong approval of what he called the "luminous judgment" of A. L. Smith L.J. in the Court of Appeal, and I think it is desirable to quote a passage from that judgment which Lord Halsbury must, I think, be taken to be approving. The learned Lord Justice observed, after an elaborate consideration of the various sections (1): "If a person carries on the "business of betting in a place akin to a betting-house, "whether such place is set up upon a racecourse or elsewhere, "then he is guilty of the betting made illegal by the Act, for "he is then carrying on the business of a betting-house in a "prohibited place. There must however be an user such as "takes place in the keeping of a betting-house or office to "be within the Act, and the user of a place in common "with mankind in general is not such an user as is contemplated by the Act. It is this user of the prohibited "place for the business of betting which is struck at by the "Act."

My Lords, I am not able to take the view that this House is bound to accept the language of Lord Halsbury as if the words employed were those of a statute. The phrase which I have quoted, which requires that the character of the use must be a use by some person having the dominion and control over the place, is a phrase which, I think, cannot be regarded as being expressed in technical language. The word "dominion," as its derivation shows, is one which in

(1) [1897] 2 Q. B. 242, 276.

strictness indicates that the person has a legal right over the place and can in general exclude others by virtue of that dominion, and I doubt very much whether the word "control" is used in a sense indicating that the person has either the right of legal control or of exclusive control. I am confirmed in my opinion by the view that a succession of judges during the last half century has given a somewhat wide meaning to the phrase in question. I cannot think that at this date it would be possible to doubt that dominion and control must indicate or include dominion or control de facto. I agree with the judgment of the Lord Justice General in the Scottish decision of *Young* v. *Darrah* (1), when he said: "I think Lord "Halsbury's dictum must be interpreted, not necessarily to "refer to any kind of de jure dominion or control, but to "include dominion or control de facto." I do not take the view that this means that the user in question is equivalent to the popular sense of the words "making use of," and if there must be some description of the limitation which, I think, should be placed upon the phrase "person using the "same," I prefer the language of A. L. Smith L.J., with which, as I have said, I think Lord Halsbury agreed, that the user must be such as takes place in the keeping of a betting house, or, I will add, the carrying on of some kind of betting business in some localized place, in order to come within the Act. I doubt whether it is satisfactory to substitute for the words "dominion and control" a reference to permissive user, or an introduction of what I may call the doctrine of permission. Admittedly there was a permissive user in the *Kempton Park* case. (2) Nor do I think it is proper to divide the racecourse decisions from those relating to other premises, except so far as the actual facts of each case may require different considerations arising from those facts. Finally, and this is the decisive feature as I think as regards the question with which I am dealing, I can find no words in any part of the Act, including the preamble, which justify the view that the user involves a dominion and control, using the words in the ordinary legal sense.

(1) 1929 S. C. (J.) 17, 21.

(2) [1899] A. C. 143.

The question must now be answered, did Payne by employing public telephones for the purpose of sending and receiving messages to and from the members in the club so communicate with, or make such an employment of, the club premises that he was "a person using the same" within the meaning of the Act? The answer, if I am right so far, must depend on whether the user was in a fair sense a user similar or analogous to that which takes place when an owner, occupier, or keeper of a house or place carries on a betting business there with persons resorting to it. Before we answer this question, we should consider what the position would be if Payne had sent letters, or telegrams, through the post office to members of the club at the club premises? Would that make Payne "a person using the club" within the section? If so, what shall we say if the members of the club take the initiative and ring up the bookmaker, who merely answers by quoting the odds and accepting the bets? Does he "use" the premises if he merely uses a public telephone for that purpose? Does a man who speaks to a house, whether near or distant, by means of a public telephone for any purpose 'use" the house within the sense of that word in s. 1 of the Act? If the view I have indicated as to the meaning of the decision in the *Kempton Park* case (1) is accepted, it does not seem to me possible to answer these questions in the affirmative, because there is in truth in such cases (assuming there is nothing more to indicate user of the place), no use similar or analogous to that which exists when an owner, occupier or keeper carries on a betting business in the place.

My Lords, I think we are driven to the conclusion that the owner or other persons in control of the place, who open, keep or use it for the first purpose mentioned in s. 1 of the Act, are only doing something illegal if the "user" is one which involves that the betting with persons resorting thereto is carried out by the owner, occupier or keeper, or by a person using the place in a popular sense who, if not present by himself or some agent or nominee, is permitted to exercise, or in fact exercises, some de facto control or some privilege

(1) [1899] A. C. 143.

or right over the place in question not being a control, privilege or right possessed by the public at large. Such a conclusion might be arrived at if the owner, occupier or person using the place received a commission on the bets, or if they permitted the bookmaker to instal and use a private telephone, or if they allowed him to stand outside at an open window and to call out the odds. Other examples might be given of permission, express or implied, extended to the bookmaker in near or over the room or place for the purpose of enabling him to make bets with persons resorting there which would be special to him, and not given to the public, and clearly allowed to him merely for the purposes of betting. In those cases the surrounding circumstances may well establish that there is such a user of the place as comes within the grounds of the decision in the *Kempton Park* case. (1) I am unable to see in this case how the mere use of the public telephone by Payne is sufficient to establish the offence against the appellants. They doubtless knew that Payne was ringing up members and being rung up by them, and they doubtless in a sense "permitted" these things; but how could they prevent them if there was a public telephone? Members were doing nothing unlawful by communicating on the telephone and making bets with a bookmaker. It may be observed in this connection that bookmakers, who send and receive from their offices messages by telephone or telegram which lead to, or which are the evidence of, betting contracts, are not liable under the Act because the persons with whom they bet are not "persons resorting" to the house, office, room or other place where the bookmakers carry on their business; for resorting must imply a physical presence to or close to the place: see *Reg.* v. *Brown.* (2) To prevent misconception I should add that "user" does not in my opinion necessarily imply a physical presence in or near the place, if the circumstances above referred to exist.

My Lords, as I have said, the question before the House in the *Kempton Park* case (1) was not concerned with a conviction under the Betting Act, and Lord Halsbury was accordingly

(1) [1899] A. C. 143.
(2) [1895] 1 Q. B. 119.

not called upon to express any opinion as to the question which should be submitted to the jury in a prosecution under the Betting Act. Your Lordships are not in that fortunate position; but it is not possible to do more than to indicate the general lines on which the jury should be directed in such a case, since the circumstances vary to an almost unlimited extent.

I will add a few remarks on the case of *Samuel* v. *Adelaide Club*. (1) The plaintiff had leased premises to the defendants on condition that they should not be used for any illegal purpose. The defendants permitted a social club to occupy the premises. They made an arrangement with a bookmaker for facilitating bets by the members with him, and private telephones were installed between the club premises and the bookmaker's office. A commission was paid by him to the club on all bets made by the members through him. The decision by Atkinson J. was that the defendants were permitting the premises to be "used" for the purpose of a person (the bookmaker) "procured" by the club as occupiers of the place betting with the members as persons resorting thereto. In my opinion this decision was quite correct. The learned judge also expressed the view that a person so "procured" by the occupier must be "procured to bet for "the benefit of the occupier." That was the fact in the case before him, and it would almost always be a reasonable inference from the circumstance that the occupier had so procured the person in question. It should be noted that the case turned on the phrase "any person procured or employed "by or acting for and on behalf of such owner, occupier, or "keeper, etc." It did not turn on the meaning of the words "or any person using the same."

My Lords, if the views above expressed are accepted, it must follow that the directions given by the judge on the trial of this case were incorrect, and that the convictions of the appellants cannot stand, and should be set aside. The appeals should accordingly be allowed.

Lord Atkin. My Lords, the appellants were convicted at the Central Criminal Court at a trial before Judge Beazley and a jury on indictments which charged them with offences against the Betting Act, 1853. They appealed to the Court of Criminal Appeal under s. 3 (*a*) of the Criminal Appeal Act, 1907, i.e., on grounds of appeal which involve questions of law alone. No leave of the Court of Criminal Appeal was asked: and therefore no question of fact, apart from law, is or can be raised. The Court of Criminal Appeal dismissed the appeal. The Attorney-General granted his certificate that the decision involved a point of law of exceptional public importance and that it was desirable that a further appeal should be brought, and thereby enabled the appellants to appeal from the decision to this House—s. 1, sub-s. 6.

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(1) [1934] 2 K. B. 69.

I mention the section in order to support the view that whatever be the point of law upon which the Attorney-General grants his certificate, once it is granted there is "a further appeal" to this House upon all the grounds open to the Court below. The appeal is not limited to the point of law of exceptional public importance, which indeed is not specified in the certificate. The result is that this House is armed with all the powers of the Court of Criminal Appeal in like case, and amongst other matters may act upon the proviso to s. 4, sub-s. 1, if it were to consider that, though the point of law was wrongly decided, no substantial miscarriage of justice had occurred.

The facts and contentions have been so fully set out in the opinion of my noble and learned friend Lord Wright that I need not recapitulate them. I would only say that I am not impressed by the novel procedure in this case of providing an "agreed statement of facts." Speaking generally, facts cannot be agreed in a criminal case, and in fact we were referred at some length to the evidence as recorded in the shorthand note.

I wish in the first place to call attention to the form of the charges made against the appellants in this case; for it appears to me that some confusion has arisen in the books and in the practice in dealing with the sections of the Betting Act, 1853. Sect. 1 of the Act, in my opinion, is directed, by way of suppression of the evil mentioned in the preamble, to making the keeping or using a house, etc., for the purposes mentioned a common nuisance. No penalty is imposed; for the persons responsible would be guilty of a common law misdemeanour. They could only be proceeded against by indictment, and the punishment would be that applicable to common law misdemeanour, i.e., a fine without limit of amount, with or without imprisonment for a term not exceeding, now, I think, two years. But in addition to the remedy by proceedings against a common nuisance, the Act, by s. 3, constitutes a criminal offence which may be committed by the persons named in the section in the manner specified; the obnoxious purposes being taken from s. 1 which specifies them for the purpose of defining the common nuisance. These offences are only triable summarily before any two justices of the peace, and on conviction the "penalty" imposed may be any sum not exceeding 100*l.* and the offender may also be imprisoned with or without hard labour for any period up to six calendar months.

In any case it is plain that proceedings under the two sections were mutually exclusive. The one constituted an indictable offence, the other a summary offence; and the penalties under the latter had no relation to the former. Before 1879 offences under these two sections could not be tried together. By the Summary Jurisdiction Act, 1879, however, a person charged with a summary offence under which he was liable to imprisonment for a term exceeding three months, could claim to be tried by a jury, and thereupon the offence is for all purposes to be deemed as regards that person to be an indictable offence. This means that a person charged under s. 3, if he elects to be tried by a jury, will be committed as though the summary offence were an indictable offence and will be indicted accordingly. The indictment therefore will be under s. 3 and will follow its terms. But the ordinary procedure in indictable cases will be followed, and the indictment may therefore contain any charge which would be justified on the evidence disclosed in the depositions, and may therefore no doubt contain a charge so supported for causing a common nuisance under s. 1. The question arose in *Reg.* v. *Brown.* (1) The accused having been charged before the justices as the occupier of a house for using it for the purpose of betting with persons resorting thereto, elected to be tried by a jury, and the indictment contained a count making this charge and also other counts charging him with using the house for ready-money betting, and also using the house without alleging that he was occupier. The Court of Crown Cases Reserved held that all these counts were in order, being founded on evidence disclosed in the depositions. Hawkins J. (2) incidentally seems to express the construction of s. 1 to which I have referred. He had already in *Reg.* v. *Preedy* (3) expressed the same view: " The object of the first "section undoubtedly was to render liable to prosecution for "causing a public nuisance any person who, having the "control over any house or other place, used or sanctioned "its use for the illegal purposes mentioned. The third section, "however, had, as it seems to me, a very much more extensive "object in view, viz., to render liable to pecuniary penalties "not only those who being owners or occupiers themselves "kept or used . . . . , but also those who, though not owners "or occupiers, actually used, etc."

In this case the appellants were, as we are told, charged before the court of summary jurisdiction under s. 3. They elected to be tried before a jury. But when the indictment is looked at it will be found that only in the case of Boundford was any charge made against them under s. 3. He was charged with assisting in conducting the business of premises used for the purpose of persons using the same betting with persons resorting thereto. All the appellants were charged with conspiracy to effect a common nuisance, on which count alone Leonard was convicted. And Milne was on count 2 charged with the offence of, as occupier, using the premises for the purpose of persons using the premises betting with persons resorting thereto, and though convicted on counts 1 and 2 was only sentenced on the second count. The offence

(1) [1895] 1 Q. B. 119.
(2) Ibid. 131.
(3) (1888) 17 Cox, C. C. 433, 436.

charged in that count was stated to be "keeping a betting "house contrary to section 1," and the count appears to have been clearly defective under that section for not alleging the common nuisance.

Green, who was acquitted, was indicted on a count expressed to be based on s. 1, which was similarly defective. I have examined, I think, all the cases reported as offences under this Act. In all the cases after 1879, but one, the accused seems to have elected to be tried on indictment, and the indictments quite properly follow the words of s. 3. In the one case excepted, *Rex* v. *Deaville* (1), there is no indication how the case came before the Recorder of Hanley, who stated the case for the Court of Crown Cases Reserved; but I think there can be little doubt that it would be on proceedings originally taken summarily. In the only case I have found tried on indictment before 1879, *Reg.* v. *Crawshaw* (2), the counts of the indictment based on the betting Acts plainly alleged a common nuisance. I venture to think that the form of indictment to be found in the present edition of Archbold, at p. 1373, which is said to be for keeping a betting house contrary to s. 1 of the Betting Act, 1853, is mistaken. It would be correct if expressed to be contrary to s. 3. If under s. 1, it omits to charge the common nuisance. The note wrongly imports the penalties from s. 3.

The appellants have not relied on defects in the form of the proceedings as grounds of appeal, but inasmuch as this House has the opportunity of reviewing the law on this difficult topic I have thought it desirable to comment on the proper procedure.

On the merits of the appeal, before discussing the alleged misdirections in point of law complained of, it seems desirable to formulate for oneself what is the law against which the appellants are said to have offended. No question here arises as to the appellants being owners or occupiers of the premises in question, for in the counts on which they were convicted the material charges were that they *used* the premises for the purpose of persons *using* the premises betting with persons

(1) [1903] 1 K. B. 468. (2) (1860) 8 Cox, C. C. 375.

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resorting thereto. There is there the double application of the "using" which is also to be found in the statute. The charge is not that they used the premises to bet with persons resorting thereto, but that they used the premises for the purpose of a third person, in the present case a known person, Payne, a bookmaker, using the premises for betting with persons resorting thereto. Incidentally, I think that the indictment was clearly faulty for not stating the name of the person alleged to have used the premises for the betting purpose. When known, the particulars should be given; where unknown, it should be so stated. The precedent in Archbold above referred to in this respect is correct. I am myself not clear that in the section the two "users" are not intended to be the same person reddendo singula singulis to owner, occupier or user, so that the present offence should be covered by the express words in the section "knowingly or wilfully permitting "the same to be used by *any other persons* for the purposes "aforesaid." Otherwise it is not easy to see the necessity for the words quoted. But assuming that the section can be construed in the way suggested by the prosecution, there are at least two essentials of the offence: (1.) that a house, office, room or other place is used; (2.) that the house, office, room or place is used by some person for betting with persons resorting thereto.

1. The present case does not raise the question whether the premises in question are a place within the meaning of the Act, the debated question which is supposed to have been decided in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1) That case seems to be relevant here only in the guidance it gives as to the meaning of using in connection with house, office, room or place. In the present case there can be no question as to the premises being a house or room. But as the argument discussed fully the cases dealing with room or place, and the supposed decision of this House in *Powell's* case (1) that no room or place can fall within the section unless the person using it for betting has dominion or control over the room or place, I think it desirable to say something

(1) [1899] A. C. 143.

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on that topic. I doubt whether it could be said that the majority of the learned Lords taking part in the decision expressed their assent to the particular words of Lord Halsbury relied on. But it seems to me clear that when he referred to "the character of the use by some person having "dominion and control over the place" he was not confining himself to legal dominion and control. They would be inadequate words to express use by a person having a licence from the true owner. But I cannot think that Lord Halsbury meant that if a bookmaker took possession of an unoccupied house or premises and there, without the knowledge of the lawful owner, carried on the business of betting with persons resorting thereto he would not be committing an offence. An apparent dominion and control must be sufficient to satisfy Lord Halsbury's words. It seems to be agreed that the use of an umbrella or stand on an unauthorized racecourse would be the use of a place. Could it be relevant that the use of the umbrella or stand had escaped the attention of the owners of the course. So in the public-house cases I cannot see why, if the bookmaker uses the bar of the public-house for betting in conditions which make it an offence if committed with the permission of the licensee of the premises, exactly similar user fails to be an offence if done without the licensee's permission. The user appears to be the same in both cases. I think therefore that *Rex* v. *Deaville* (1), and the cases that followed it, were wrongly decided so far as they laid down the test of permission by the occupier.

2. What then is the meaning of using the premises for the purpose of betting with persons resorting thereto? It is conceded that it does not apply to members of a club using the club premises and therein betting with other members of the club. It is a different kind of user to that of the persons who resort to it for betting. Further, it seems to me primarily to convey the idea of physical presence at the place. That does not exclude a secondary meaning which must be discussed, but, primarily, it has the meaning suggested, and there will hardly be found a case in the books where the

(1) [1903] 1 K. B. 468.

ultimate offender "using the premises for betting" was not in fact by himself or his agent on the premises.

It is on this aspect of the case that things were said in the Courts below that have no doubt led to the certificate being given which authorized this appeal. The learned trial judge used language which perhaps was sufficient to convey to the jury that telephoning was not enough, though he did say: "You must be satisfied that there was some definite arrangement between Milne and himself that he should be there "for that purpose. . . . . The intervention of the telephone "does not eliminate the user and take the bookmaker outside "the forbidden persons." But in the judgment of the Court of Criminal Appeal these words occur: "It was said in "*Samuel* v. *Adelaide Club, Ld.* (1), that it could not be said that "in that case the bookmaker was using the premises, because "he was only telephoning to the premises. As Atkinson J. "pointed out, and as this Court is clearly of opinion, it is the "right and only view that a person who uses the telephone "by permission of the owner of the premises to telephone "and continue telephoning the whole afternoon to the "members of the club is acting in exactly the same way as "if he stood at the door of the club and talked to the members "and made bets with them. It is his voice which reaches "the members at the other end of the telephone, and the "oral arrangement which is sufficient to make the bet is made "on the telephone in exactly the same way as if those persons "were face to face instead of being separated as they were "at a distance of 50 yards." Fifty yards was the distance between the appellants' club and Payne's offices. My Lords, one would agree that if the bookmaker stood at the door and made his bets verbally with the members he would be using the premises for betting with the members. It cannot matter whether it was during the whole afternoon or less, and it cannot matter whether he did so with the permission of the owner or not. But I entirely disagree with the notion that when two persons converse on the telephone they are to be considered for any purpose of locality to be both face

(1) [1934] 2 K. B. 69.

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to face. It seems to me to be an unscientific conception which is plainly wrong. If A in London speaks to B in Manchester, are they face to face in London or in Manchester or in both? And if the parties are in London and Paris, or Ostend, or New York, is the same proposition true? And if A, the bookmaker, when telephoning to B, his customer, at the club is face to face with him at the club, is B, the customer, face to face with A at the bookmaker's office? And if so is B resorting to the office? I think that, though it is true that bets can be made by telephone and may be completed according to circumstances either at the club or at the bookmaker's office, the bookmaker while at the office is not using the club: any more than the butcher or the baker is using his customer's residence when orders are given and accepted over the telephone. And if this is so it surely can make no difference that the owner of the premises "permits" the use of the telephone. The use of the telephone, therefore, does not constitute the bookmaker a user of the premises so that he can be said to be physically there. On the other hand it is plain that he may be using the premises for betting if an agent is there conducting betting business for him. I also think that he can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place where he is carrying on his betting business. I do not think that he need have any legal right of occupation: or that he need be a partner with the actual occupier. Payments made to the occupier or keeper or user of the premises either by way of commission or otherwise for the privilege of betting with the persons resorting to the premises, the installation by the bookmaker on the premises of facilities for betting with him, such as a private telephone or possibly a private letter-box, the provision by the occupier, etc., of the premises of special messengers to convey betting communications, or special facilities given on the premises for the reception of such messengers, special facilities given to the occupier for procuring betting credit for the persons resorting to the premises (as suggested in the present case) might well afford evidence on the question of fact whether

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the bookmaker was in fact carrying on his business on the premises. Possibly none of these facts would be sufficient of themselves, but in every case it must be a question of fact for the jury whether the business was carried on as stated, and a question of law for the judge whether there is any evidence to satisfy the onus of proof which exists in every criminal case. It would have to be pointed out that the business on the premises need not be the whole or even the principal part of the betting business. In this respect it does not seem to be necessary to decide that the occupier had in fact "arranged" with the bookmaker that he should carry on his business there. As I have said, premises can be "used" in contravention of the Act without the permission of the occupier: but it will be obvious that the kind of evidence that I have suggested would not usually exist without the consent of the owner.

I have not dealt with the case of the occupier procuring a bookmaker to bet with persons resorting to the premises. The facts suggested above might also be evidence of "procuring," a question of fact which was decided against the occupier in the case of *Samuel* v. *Adelaide Club, Ld.* (1) There was, no doubt, evidence to support such a finding. The only objection to the decision is that it led to the view as to telephoning taken by the Court of Criminal Appeal in the present case. For the reasons I have given, so far as it suggested that the two persons telephoning are in personal contact at the place where the message is received or sent it seems to me with respect to be wrong.

The question then to be considered by the tribunal of fact, whether justices or jury, when a charge is made that a bookmaker has used premises for the purpose of betting with persons resorting thereto, is the same whether the bookmaker has been actually present on the premises or not. Has he in fact been carrying on his betting business there betting with persons resorting thereto? And the jury should be warned, and justices should remember, that the fact has to be established beyond reasonable doubt as in all criminal proceedings.

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(1) [1934] 2 K. B. 69, 74.

In the present case I think all your Lordships are of opinion that the summing-up did not sufficiently define the offence, and that the conviction must be quashed on that ground. I will not enumerate the various passages which are assailed by the appellants. It is sufficient to say that though the judge repeatedly warned the jury that it was not sufficient to show that in fact bets were made by telephone with Payne, yet he repeatedly told them that the offence would be constituted if they were satisfied that, in addition, an "arrangement" existed between Payne and the appellant, Mrs. Milne, but he never defined what that arrangement must be. "You must be satisfied," he said, to give one instance, "that there was an arrangement between him, "Payne, and Mrs. Milne, that betting should take place." He then went on to say "if you are satisfied that there was "an arrangement, tacit if you like, but which was perfectly "well understood that it was to the advantage of both of "them that Payne should have the connection with the club "which he undoubtedly had, that the room upstairs was "taken by him or his clerk in furtherance of that arrangement "—as I have said to you it may be a useful pointer to you "when you consider what Green said, that it was an arrange-"ment with the club that the room was there—if you are "satisfied of that then the offence was committed." My Lords, for the reasons I have given, this passage does not appear to me to state at all accurately or definitely the true issue. But standing alone in my view it would be sufficient to cause the conviction to be quashed, for the learned judge, no doubt inadvertently, upon the very issue which he had repeatedly told the jury they must find, namely, an arrangement between Mrs. Milne and Payne, told the jury that the statement of Green, which was evidence only against himself, was evidence against Mrs. Milne of that very arrangement. I am myself quite unable to follow the passage in the judgment of the Court of Criminal Appeal which says: "The expression "'it may be a useful pointer to you' is not quite the same "as saying—indeed it is a different thing from saying—I direct "that you may consider that evidence." Surely any member of a jury told that a fact referred to was a pointer towards a conclusion at which he was invited to arrive would think that he was being told that the fact would guide him to the conclusion: in other words that it was not only evidence, but strong evidence of the conclusion. At any rate I know that I should. In view of the unsatisfactory evidence as to the alleged arrangement this direction might well have led to the conviction. For these reasons I am clearly of opinion that the appeal should be allowed and the conviction set aside.

LORD MACMILLAN. My Lords, I agree with the opinions which have been expressed by my noble and learned friends the Lord Chancellor and Lord Atkin and also with those about to be expressed by or on behalf of my noble and learned friends Lord Wright and Lord Porter, all of which I have had the advantage of reading in print.

LORD WRIGHT. My Lords, these appeals have been brought under certificates given under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, by the Attorney-General that the decisions of the Court of Criminal Appeal which are appealed from, involve points of law of exceptional public importance and that it is desirable in the public interest that the appeals should be brought. They raise questions under the Betting Act, 1853, which will be described as the Act. The substantial issue may be said to be whether the appellant Florence Milne used or kept certain premises called the Byculla Club, of which she was occupier, for the purpose of one Payne, a bookmaker, using the same for betting with persons resorting thereto contrary to the Act.

Your Lordships were furnished with a statement of facts agreed by all parties to this appeal, prepared for the use of your Lordships subsequently to the decision of the Court of Criminal Appeal. But transcripts of the shorthand notes of the evidence at the trial were also supplied and certain passages have been referred to in argument before your Lordships. [His Lordship read the agreed statement of facts and continued :] Payne in his evidence denied that the mere fact that a man was a member of the Byculla Club was a sufficient qualification to open an account with him so that he could telephone his bets from the club. He said, according to the evidence, he would meet the member, perhaps at the club, and if satisfied with him, would accept his bets by telephone from the club.

The appellant, Mrs. Milne, who had an account, would often put through it bets for other members who had no account in their own name, as did also the appellants Leonard and Boundford.

The indictment consisted of five counts. Of these counts 1, 2 and 3 are now material. Leonard was acquitted on count 4, which charged him with using the premises of the Byculla Club for betting with persons resorting thereto. Green was acquitted on count 5, which charged him with ready-money betting. Count 1 was a charge of conspiracy to commit the offence of using premises for betting contrary to s. 1 of the Act. The three appellants were convicted under that count, Green being acquitted. The appellant Milne was convicted under count 2 of keeping a betting house contrary to s. 1 of the Act, namely, that on May 18, 1938, and other days between that date and June 24, 1938, she used the premises of the Byculla Club for the purpose of persons using the premises betting with persons resorting thereto. At the trial the category of " persons " so using the premises, who were not identified by name in count 1, was limited to Payne, and the count was treated as restricted to him. Boundford was convicted under count 3 of assisting in conducting the business of the Byculla Club as a betting house. The case was tried before Judge Beazley at the Central Criminal Court on September 27, 1938.

The appellant Milne was sentenced under count 2 to pay a fine of 50*l*. and to pay the costs of the prosecution. No sentence was passed on her on count 1. Boundford was sentenced to a fine of 25*l*. on count 2, and Leonard was sentenced to a fine of 25*l*. on count 1.

The appellants appealed against the conviction and sentences to the Court of Criminal Appeal, which on September 19, 1938, dismissed the appeals. The ground of appeal was that the judge had misdirected the jury in respect of certain directions on the law which he gave in his summing up. Before your Lordships, the appeals have been based on the grounds that the summing up to the jury contained statements which expressed or involved errors of law, in particular on the construction and effect of the Act as applied to the facts of the case.

The judge explained to the jury that credit betting, whether or not by telephone, was not per se an offence, but he said that the case made by the prosecution was that the premises of the club were used primarily for betting—" member after "member comes in and bets and mostly with the same book-"maker—that is Payne—and that here there was a perfectly "obvious artifice to try to get out of the Act." As to s. 1 of the Act the judge said that it was necessary for the prosecution to show not merely that the club premises were in fact used for betting, but that the owner occupier or person using the same was using them for the purpose of betting with persons resorting thereto. It will be convenient to set out the most material passages relied on by the appellants as constituting the misdirection. The judge stated that the case for the prosecution was that it was not necessary for Payne the bookmaker to be there on the premises, if an important part of the transaction such as telephoning the bets was done in the premises in the way that the members did to Payne, Green also being put by Payne in the room above, and that the jury were driven to an irresistible conclusion that there was an arrangement that it should go on. It is not quite clear how much of this was merely a statement of the case for the prosecution, but the judge went on to say: " There "is no evidence in this case that Payne paid Mrs. Milne "anything for it, but you can see for yourselves, members of "the jury, when you get a club of that type, the advantage "that the club gets from it. These people come to make "bets there. Mrs. Milne knows perfectly well what is going "on there, and she knows that they come, make bets and, "as far as the evidence goes, for precious little else. Of "course they can get a glass of beer or a sandwich, but what "is the main purpose for which this place has been used? "If you come to the conclusion that the main purpose for "which that club was used was for making bets with Payne, "then, members of the jury, you would be entitled when "you look at all the circumstances of the case, if you were "satisfied that they irresistibly pointed to the conclusion that "Mrs. Milne and Payne, although they may have had no "written agreement about the thing and although there was "no evidence that there was any oral agreement, no evidence "of anything except what actually went on—you may well "come to the conclusion that there was a tacit arrangement "between these two all along that it would be a very fine "thing for the club to get this sort of thing going on there "and that it should be done. Now, members of the jury, if "you come to that conclusion, and it is entirely a matter "for you, I should then say that Payne, the bookmaker, does "come within the category of a person using that club because "he is so identified with the owner or occupier of it as to "bring him within the section."

A little lower down the judge said: "If you think that "there was no arrangement between Payne and Mrs. Milne "at all, and if you think that this was merely the case of "members of a club going to the place and ringing up their "bookmakers and placing bets with them, or, if you like, "asking Green or Leonard to do so for them, and that there "was nothing more to it than that, then there is no offence. ". . . . If, on the other hand, having weighed all the "evidence, you come to the conclusion that this place was "used by Mrs. Milne for the purpose of the persons who "used it, in the sense that they were identified with her by "an arrangement, that it should be so used, for the purpose "of betting with the members; if you are satisfied of that, "then the offence would be committed."

Later on there is a further passage in the summing up which is complained of. The judge was stating the two questions to be considered by the jury before they can find a verdict of guilty. The first was whether the premises were in fact used for the purpose of betting. Then the judge thus stated the second question: "Is Payne a person using "the said premises in the sense I have tried to point out "to you, for the purpose of persons betting with persons "resorting thereto; that is to say, is he in the description of "forbidden persons? I hope, also, I have made that clear "to you, that in order that he should come within that class, "you must be satisfied that there was some definite arrange-"ment, or understood definite arrangement, between Milne "and himself, that he should be there for that purpose. "There is no doubt that the mere fact that the bets were "telephoned does not take the case outside the Act. The "intervention of the telephone does not eliminate the user "and take the bookmaker outside the forbidden persons. "You can see that for yourselves, because what is the position "supposing the bookmaker was present and that what was "said on the telephone was said to him in person? Then, "clearly, the premises would be used for the purpose of "making bets. The essential parts towards the completion "of the bet occurred at the premises."

The judge went on to summarize the material facts and referred to the constant telephone messages by members of the club, "most of them to Payne" and to the room Green had on the next floor under a lease separate from that of the club, and went on: "Members of the jury, it is entirely a "matter for you. If you are satisfied that Payne had that "room there and that Payne had these bets with the members "—I mean bets in the sense that they were telephone bets— "and that it was all in pursuance of an understanding between "him and Mrs. Milne, I do not think you will have very "much hesitation in coming to the conclusion that those "club premises were used consistently for the purpose of "bets being made through the telephone with Payne and "that Payne was in fact a person using those premises for "the purpose of betting with persons resorting thereto."

The judge told the jury to exercise their common sense and knowledge of the world, and proceeded to say: "but if, "on considering the whole of the evidence you come to the "conclusion—and there is plenty of evidence for it—that this "place was used for very little else except for the purpose of "betting, that that was the major portion of its duty and "that Payne had that office upstairs with Green officiating "there on an understanding because it was convenient for "him, because there seemed to be a lot of members betting "at that club, that they should be able to telephone those "bets to Payne and that he, Payne, should have Green on "the spot to make settlements after the race—because it was "a business that did earn a bit of commission—if you are "convinced of that, then they would be guilty of the offence "with which they are charged."

Finally, the judge concluded his direction to the jury on this part of the case in the following words: " You have got "to be satisfied of two things: that the club premises were "used for the purpose of betting, and that Payne was a person "using those premises for the purpose of betting with the "persons resorting thereto, in the sense I have endeavoured "to describe. The onus of proof is on the prosecution to "satisfy you of that. You must be satisfied that there was "an arrangement between him, Payne, and Mrs. Milne that "betting should take place. Mr. Clarke in his final speech "to you went so far as to say that Mrs. Milne procured Payne "to carry on that business; he went so far as that but I do "not think it is necessary that you should go so far as that. "If you are satisfied that there was an arrangement, tacit if "you like, but which was perfectly well understood, that it "was to the advantage of both of them that Payne should "have the connection with the club which he undoubtedly "had, that that room upstairs was taken by him or his clerk "in furtherance of that arrangement—as I have said to you, "it may be a useful pointer to you when you consider what "Green said, that it was an arrangement with the club that "that room was there—if you are satisfied of that, then the "offence has been committed."

The jury were not directed as to what " arrangement," if there were one, between the appellant Milne and Payne, would in law be sufficient to constitute Payne a person who was using the club premises in breach of s. 1 of the Act. Payne was not charged in the indictment. The facts as to his position seem to have emerged only at the trial.

The Court of Criminal Appeal held that there was no misdirection by the judge, and approved of his summing up. In particular the Court expressed the opinion that a person who uses the telephone by permission of the owner of the premises and makes bets is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them. Hence it was said Payne used the premises just as much as if he made the bets with the members face to face, and thus used the club premises as his betting office, though all the time he stayed on his own premises, for the essential part of the business of making a bet, that is the acceptance of the bet. The mere fact, it was said, that he used the telephone for that purpose can make no difference to the legal position.

The two main objections to the summing up are (1.) that the jury were told that Payne in receiving at his own office bets telephoned by the members from the club premises was as much using the club premises as if he were personally present in them, and (2.) that the jury were not instructed what kind of arrangement between Milne and Payne might constitute a user of the club premises by Payne for betting with persons resorting thereto. Both these objections turn on the construction of the essential provision of the Act which forbids the using of any house, office, room or other place for the purpose of the owner, occupier or keeper thereof or any person using the same (in this case Payne) betting with persons resorting thereto. There is no question that the club premises constituted a "place"; or that the members were persons resorting thereto. The question is: Was Payne using the club premises for betting with the members resorting thereto? The two main objections to the summing up thus involve two separate questions, but though they are distinguishable and have to be considered apart from each other, they involve under associated aspects the question of law, what is the meaning of "using" the premises for the purpose specified? On the first point it is said that Payne used the club premises for the purpose of betting with the members resorting thereto, because the members telephoned from the premises the bets to him and he accepted them by telephone to the members who were in the club. This seems to me to be a distortion of the ordinary meaning of a plain word, "using." The people who use the club premises for telephoning the bets are the members, not Payne, who in turn uses his own premises to telephone the answer. The mechanical device of the telephone enables people at a distance to speak to each other and hear each other's voices, but it does not change the local position of each speaker or per se make Payne a person using the premises at which at the moment he is not. How far the respondent's contention is removed from ordinary parlance becomes obvious when it is seen to follow from it that the local tradesman who accepts a telephoned order from my cook is, on that view, using my house; similarly, that when a member of an ordinary social club telephones a bet from the club to his bookmaker, the bookmaker is using the club. In this connection distance would be immaterial. If a man telephones from England to a bank in New York, can he be said to be using the bank premises in New York, or if the banker replies, can he be said to be using the premises of his interlocutor. I am for the moment treating this point in abstraction, as indeed it must be considered. Nor can the inaccuracy of the abstract proposition that a person, who telephones to another person who is in other premises, is thereby using those premises, be cured in any way because the telephoning is repeatedly done or because it is done in the course of betting. The question which for the moment must be separately examined is simply whether the bookmaker is using the premises to which he telephones. If he does not, then the further and more complex question of user of the premises for the purpose of betting with persons resorting thereto does not arise unless there are further circumstances showing such user. The Court has no right to give an unnatural meaning to a plain word because the particular mechanical device was undreamt of at the time of the Act, or because it might be thought that the particular operation is within the mischief of the Act. The Act must be construed according to the natural meaning of the language used. This is all the more so since it is an Act creating a criminal offence. It is for the Legislature, if they so desire, to amend the law to meet the new circumstances.

In my opinion the judge misdirected the jury when he told them that the intervention of the telephone did not eliminate the user. He went on to say: "You can see that for your-"selves because what is the position supposing the bookmaker "was present and that what was said on the telephone was "said to him in person. Then clearly the premises would be "used for the purpose of making bets." The latter statement is correct. The misdirection is in treating the use of the telephone as shifting the local situation of the bookmaker from the place in which he actually was and which he was using, to the club premises, which not he but the club member who resorted thereto was using, quite lawfully so far as he was concerned for the purpose of making bets. It follows that I cannot agree with the perhaps clearer statement to the same effect on this matter made by the Court of Criminal Appeal to which I have referred. If a similar statement is involved in the judgment of Atkinson J. in *Samuel* v. *Adelaide Club, Ld.* (1), I do not agree with it. That case was a case of "procuring" under s. 1 of the Act and is not directly material in this case.

The second objection, which is different in principle and requires separate consideration, turns on the references by the judge in his summing up to an "arrangement" between Mrs. Milne and Payne, which would justify the jury in finding that Mrs. Milne was using the premises for the purpose of Payne using them for his betting business. Now, I do not question that there might be an arrangement such as to make Payne a person using the premises though he was not personally upon them. For instance, it might have been proved

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that Mrs. Milne was simply a nominee or agent of Payne, and in that way Payne, though not physically on the premises, was using them by her instrumentality in the conduct of his betting business with the members. Short of so clear a case, the same result might be achieved by a less obvious machinery. The actual occupier of the house, office, room or place might be in partnership with the bookmaker, or in some other way the premises and the business of betting done thereon might be conducted by the occupier and the bookmaker on a joint basis of co-operation in some form or other. I do not attempt to imagine all the schemes which ingenuity and desire of gain might devise to enable the bookmaker to use the premises for his betting business without appearing to do so. The scheme might depend on a variety of concurrent circumstances, for instance, if a private telephone was installed in the club premises, especially if it was done at the cost of the bookmaker for use by the members for betting with him, and the occupier of the premises was paid a commission on all bets telephoned, these circumstances, perhaps combined with others, might constitute evidence on which a jury would be entitled to find that the bookmaker was using the house or place for betting with persons resorting thereto. I am not attempting to exhaust the possible permutations and combinations of fact which the jury might have to consider. It must be a question of fact for the jury or for the justices in all the circumstances of the particular case. The vice of the judge's summing up under this aspect is that he gave the jury no guidance as to what they had to consider or what they had to find in order to convict. There was, in fact, so far as I can see, no evidence of any arrangement between Mrs. Milne and Payne which would justify the conclusion that the former was using the premises for the purpose of Payne using them for his betting business. So far as the evidence went the club was used indeed for betting, but it was so used by the members, which was not unlawful. The presence of Green in the separate premises on the floor above no doubt was a convenience in the prompt settlement of bets, but in itself it was legitimate. Payne gave no special facilities to the members, and Mrs. Milne used the open account of her own which she had with Payne to make bets for members with Payne, so far as appears, in order to help the members, not Payne. This is all that appears on the evidence, and is consistent simply with the position that Payne's business was the bookmaker's business which was most largely, though not exclusively, patronized by the club members. The judge never warned them what sort of arrangement they would have to find between Mrs. Milne and Payne before they could find that Payne though not personally present and conducting a betting business at the club premises was in fact using the premises for that purpose. All he did was to speak vaguely of Mrs. Milne being identified with Payne, or of an arrangement that it should go on. I do not think that convictions by a jury who were left in such confusion as to the facts of which they must be satisfied before they could convict, can be supported. This is a matter larger than, and distinct from, the mere use of the telephone. And it is a further defect of the summing up that the two matters are confused and never separately put before the jury by the judge, and thus the defectiveness of the summing up is aggravated.

I have not found much assistance from the cases cited, except in so far as they illustrate such general propositions of law as that it is not unlawful for members of a club to bet with each other, or with bookmakers. Some reference was made to Lord Halsbury's phrase in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1), that under the Act the illegality depends on " the character of the use as a use by some person "having the dominion and control over the place, and con-"ducting the business of a betting establishment with persons "resorting thereto." It is not clear, but I shall here assume, that Lord Halsbury's speech represented the opinions of the majority of the House. It may be that these words would if taken in their full and literal significance at once rule out Payne from the category of a person using the club premises. But equally they would rule out other cases where the offence

(1) [1899] A. C. 143, 160.

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has been held to have been committed, rightly as I think, such as the case of the bookmaker who used a slag heap on waste land as the place for his betting business, or the workman in Scotland who, without the knowledge or permission of his employers, used the room in which they were allowed to have their dinner to conduct a betting business with his fellow workmen : *Young* v. *Darrah.* (1) I agree with that decision. A like case would be that of a bookmaker who, without the permission of the publican or any authorized agent of his carried on his betting business in the bar of the public-house. Permission is, I think, immaterial in cases of this type, if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier. I think Lord Halsbury meant no more by these words than such de facto dominion and control as enabled the bookmaker to ply his trade in the place. I do not need further to discuss the much convassed case of *Powell* (2), which does not seem to throw light on the questions discussed here. There is here obviously no question that the club premises were potentially a place within the meaning of the Act. The question whether they were used in the prohibited manner turned on considerations different from those in *Powell's* case. (2) On the questions of procedure discussed by my noble and learned friend Lord Atkin, I agree with what he has said.

In my opinion the convictions appealed from cannot stand, and the appeals should be allowed.

LORD PORTER (read by LORD MACMILLAN). My Lords, Your Lordships have already heard from the speech of the noble and learned Lord, Lord Wright, what are the facts proved in evidence and that the question to be determined is whether the learned judge's summing up was accurate in point of law, or adequate in point of fact.

In considering these questions it is necessary to bear in mind exactly what the charge was and to eliminate the possibility of a conviction for some other offence.

(1) 1929 S. C. (J.) 17.

(2) [1899] A. C. 143.

Your Lordships have not analysed the evidence for the purpose of considering whether a conviction for offences other than those for which the appellants were found guilty could have been supported ; and no question arises as to whether a charge of opening, keeping or using the Byculla Club for the purpose of a person procured or employed by or acting for or on behalf of the owners betting with persons resorting thereto, could have been sustained.

If then the charge actually preferred alone be considered, the question of the correctness of the summing up and the liability of the appellants may be adequately discussed by confining the attention to count 2 of the indictment, i.e., that against Milne for using the premises for the purpose of a person, namely Payne, using the premises, betting with persons resorting thereto.

It is unnecessary to consider the question of conspiracy, since, to be convicted of that offence, the parties would still have to conspire to commit the offence charged in count 2.

In the present case no question arises as to whether there was a defined place such as directly arose in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1) The house, the user of which is complained of, is identified—the charge is of user of the Byculla Club. Nor is there any question whether persons resorted thereto or that those persons used the club for betting with Payne. The evidence was ample to prove both facts. But the matter to be determined is not whether the club premises were used for betting—as indeed they were—it is rather whether Payne used them for betting with the members.

Apart from authority I should have said that a de facto user of the premises must be proved but that a de jure user is unnecessary. X may commit an offence by using the place for the purpose of X himself using the premises betting with persons resorting thereto or by using it for the purpose of Y using the premises betting with such persons ; and in the second case Y also commits an offence under s. 1. But Y, who is himself merely a user, may commit an offence, even if the owner or occupier is ignorant of his action, provided that

(1) [1899] A. C. 143.

his acts constitute a user of the premises for the purpose of Y betting with persons resorting thereto.

In either of the first two cases X must have some sort of control over the premises, otherwise he could not use the premises. So likewise in the second and third cases must Y have some measure of control and for the same reason, but neither the one nor the other need be an owner, occupier or keeper. A defined place and sufficient control over it to stay there and bet with persons resorting thereto would seem to be enough. But there must be a place to which people can resort and sufficient occupation of it in fact by some person to enable them to bet with him.

So far as Milne is concerned the evidence showed that she was tenant of the premises and carried on the club, and the place was opened, kept or used—any of the three words is appropriate—by her. Moreover, it was used for the purpose of Payne betting with persons resorting thereto—namely the members.

Those matters are not in question but are not enough to support a conviction. In order that the conviction may be affirmed Payne must, it is true, bet with persons resorting to the premises, but he must also use the premises for that purpose.

What then is meant by " user." No doubt physical presence might be enough and, though the mere opening of the house for the purpose specified before any actual betting took place would constitute an offence, yet as a rule some evidence of the repetition would be required to show the purpose for which the premises were opened, kept or used.

User through a servant or agent including a partner would also, I think, suffice. Some physical control such as a private telephone connecting other premises with those alleged to be used might be enough, and some sharing of profits or payment for the privilege of betting with members might constitute a user of the premises, but I doubt if it is possible to find a formula which would fit all cases. The draughtsman of the Act has adopted the word " user," and though the wording might have been clearer, I doubt whether any more definite word would express the meaning more accurately.

If no general definition is possible, one is thrown back upon a consideration of the evidence in the present case to discover if there was in fact a user by Payne. It is true that he was a member of the club, but there is no evidence that he used the club premises in any different way from the other members except that Green came down from the room above and settled members' accounts either by collecting or paying money. But that is not to bet but to settle bets which have previously been made and is no offence under the section: *Bradford* v. *Dawson.* (1)

It is true also that Milne had a betting account with Payne and was accustomed to use that account in order to place bets and at times to pay winnings to or recover losses from members, but to do so is prima facie to act as agent for the members and not as agent for Payne, and though her action constitutes a user of the premises by the members for betting with Payne, it does not constitute a user by Payne for betting with the members.

Nor in my view is the fact, even if established, that Payne would accept members of the club as clients more readily than outside persons a user of the premises. I doubt whether an expectation, even if justified, or even an arrangement, that members of the club would receive special consideration from an individual bookmaker, would, without more, constitute a user of the premises by that individual. But no such arrangement was proved or found by the jury to exist and it is not necessary finally to determine this question.

Finally it was suggested upon the authority of *Samuel* v. *Adelaide Club, Ld.* (2), that Payne might be said to be present at the club because Milne or the club members were accustomed to use a particular room in order to make bets with Payne by telephone. But the telephone was a public one, and though the members no doubt used the room for betting, Payne did not. If he were held to have done so, then a bookmaker might be said to use any premises from which

(1) [1897] 1 Q. B. 307.

(2) [1934] 2 K. B. 69.

his clients communicated with him. But it is said the primary use of the room was for telephoning to and receiving messages from Payne as a result of which bets were made either on the club premises or at Payne's offices. If an arrangement had been proved between Milne and Payne that the room should be reserved for Payne's purpose or even partially so reserved, that might amount to a user by Payne, but no such reservation was proved and in any case the summing up was not directed to the existence of any such arrangement, or indeed of any defined arrangement.

It was to this last aspect of the case that the appellants directed their main attack against the summing up.

Some arrangement between Milne and Payne they acknowledged might constitute a user of the premises by Payne, but the learned judge who tried the case never directed the attention of the jury to the kind of arrangement required, but left them to imagine that any arrangement aiming at the encouragement of betting between Payne and members of the club was sufficient.

The learned judge says that Payne need not be there, and adds, " . . . . if an important part of the transaction such as "telephonng the bets is done on the premises, and you come "to the conclusion that it is in pursuance . . . . of some "arrangement between Milne and Payne, that would be "sufficient to bring Payne within the description of a person "using the same".

Elsewhere he speaks of " an arrangement between Milne "and Payne that it " (presumably telephone betting) "should "go on," and again of " a tacit arrangement between these "two that it would be a very fine thing for the club to get "this sort of thing going on there and that it should be done," and of Payne thereby " being identified with the owner." Later he says that there must be some definite arrangement between Milne and Payne that Payne should be there for the purpose of betting with members, and adds, " the mere fact "that the bets were telephoned does not take the case out "of the Act."

Later again he says, after speaking of the room which

Payne had hired in the same building as the Byculla Club: "If you are satisfied that Payne had that room there and "that Payne had these bets with the members—I mean bets "in the sense that they were telephone bets—and that it "was all in pursuance of an understanding between him and "Mrs. Milne, I do not think you will have very much hesitation "in coming to the conclusion that those club premises were "used consistently for the purpose of bets being made through "the telephone with Payne and that Payne was in fact a "person using those premises for the purposes of betting with "persons resorting thereto."

Finally he says: "You have got to be satisfied of two "things; that the club premises were used for the purposes "of betting, and that Payne was a person using those premises "for the purpose of betting with the persons resorting thereto "in the sense I have endeavoured to describe. The onus of "proof is on the prosecution to satisfy you of that. You "must be satisfied that there was an arrangement between "him, Payne, and Mrs. Milne, that betting should take place. "Mr. Clarke in his final speech to you went so far as to say "that Mrs. Milne procured Payne to carry on that business; "he went so far as that but I do not think it necessary that "you should go as far as that. If you are satisfied that there "was an arrangement, tacit if you like, but which was perfectly "well understood, that it was to the advantage of both of "them that Payne should have the connection with the club "which he undoubtedly had, that that room upstairs was "taken by him or his clerk in furtherance of that arrangement "—as I have said to you it may be a useful pointer to you "when you consider what Green said, that it was an arrangement with the club that that room was there—if you are "satisfied of that then the offence has been committed."

I have quoted in each case from that part of the summing up complained of and at the end I find it difficult to ascertain what the suggested arrangement was.

An arrangement; an arrangement that it would be a very fine thing for the club to get this sort of thing going; an arrangement that Payne should be there for the purpose of betting, and he might be there though bets were telephoned; the taking of the upstairs room and telephone bets with members in pursuance of an understanding; an understanding that the members should be able to telephone bets to Payne and Payne should have Green on the spot to make settlements; a procurement of Payne is not necessary; it is enough if there was an arrangement that Payne should have the connection with the club which he undoubtedly had.

Those are the explanations given of the kind of arrangement required to make Payne a user of the premises.

I do not think that they give sufficient guidance. There was no evidence that the upstairs room was taken under an arrangement with Milne except a statement of Green admissible indeed against him but against no one else: yet a jury might possibly have thought that taking the room upstairs was a sufficient arrangement and would in any case consider telephone betting a contravention of the Act provided it was done with Milne's connivance.

No case gives any real measure of support to the present decision.

The Court of Criminal Appeal base their judgment substantially on the ground that the learned judge left to the jury the question whether there was an arrangement between Milne and Payne that Payne should have facilities for betting with members of the club, and that Payne might none the less be using the club though he spoke only through the telephone. " A person," they said, " who uses the telephone "by permission of the owner of the premises to telephone and "continues telephoning the whole afternoon to the members "of the club is acting in exactly the same way as if he stood "at the door and made bets with the members." For this statement they quoted *Samuel* v. *Adelaide Club, Ld.* (1) But that case was decided, so far as the bookmaker was concerned, not on the ground that he was " a person using " the premises but on the ground that he was " a person procured " by the owner. In the present case no question of procurement arose, and the jury neither found nor were asked to find that Payne was given any special privileges in the club itself though like any one else he could telephone or be telephoned to.

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(1) [1934] 2 K. B. 69.

Many cases have been decided upon the terms of the section mostly with reference to the meaning of the word " place " but also with reference to the " user " required to create an offence.

Both matters were discussed in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1) That case is primarily a decision as to what is a " place," and determines that Tattersalls' ring in which many bookmakers congregate, is not a place within the meaning of the Act inasmuch as no bookmaker, though usually to be found at a particular spot, takes his stand at an individual place, nor has any particular spot been allotted to him. He is free to bet on any part of the course and, though the owners of the course know that he goes to Tattersalls' ring, yet they do not set aside any particular part of the course for his use. The appeal was heard by ten Lords of Appeal and of those four appear also to have held that " user " was not established unless the person using had some sort of control over the place used : and two more concurred in the general result.

Lord Halsbury L.C., who made the leading speech, indicated that in his view the person using the place must occupy a position analogous to an owner, occupier or keeper of the place ; and that unless he did so there was no user such as was contemplated in the wording of the section.

The action was a civil one brought by a shareholder of the defendant company claiming an injunction to restrain that company from opening or keeping the inclosure known as Tattersalls' Inclosure for the purpose of persons using the same for the purpose of betting with persons resorting thereto. Its object was to test the correctness of the judgment in *Hawke* v. *Dunn* (2), which, being decided upon a case stated, was not appealable beyond the Divisional Court.

In *Hawke* v. *Dunn* (2) it was held that a bookmaker who carried on the business of betting in Tattersalls' Ring at Hurst Park was guilty of unlawfully using that enclosure for

(1) [1899] A. C. 143.

(2) [1897] 1 Q. B. 579.

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the purpose of betting with persons resorting thereto contrary to the statute 16 & 17 Vict. c. 119, s. 3. *Powell* v. *Kempton Park Racecourse Co., Ld.* (1) in effect overruled that decision.

In neither case, however, was any de jure user proved—the bookmaker had no more rights in the ring or elsewhere on the course than any other member of the public ; and no de facto user was established because no particular place was set aside for or used by any particular bookmaker. Moreover, though the result was concurred in by all save two of their Lordships, I do not think that the majority necessarily endorsed the observations of Lord Halsbury in full. In so far as those observations may seem to indicate that the section requires a de jure user before an offence can be committed, they must, I think, be read in the light of the matters there in issue.

So read, they do not conflict with the interpretation which I venture to think the Act bears. But whatever their meaning, they give no support to the respondent's contentions in the present case.

I would allow the appeals and quash the convictions.

Appeal allowed.

Solicitors for appellants : *Docker, Andrew & Co.*
Solicitor for respondent : *City Solicitor.*

(1) [1899] A. C. 143.

[HOUSE OF LORDS.]

CULL . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE . RESPONDENTS.

H. L. (E.)*
1939
June 15, 16, 19, 20, 22; *July* 27.

Revenue—Income tax—Sur-tax—Dividend paid "without deduction of "income tax"—Not equivalent to payment "free of tax"—Grossing up dividend for purpose of sur-tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 28), *s.* 7.

A dividend declared on ordinary shares "without deduction "of income tax" cannot for the purpose of sur-tax be grossed up. Grossing up for this purpose can only be done when a dividend is declared as a "net" dividend, that is, a dividend reduced from a larger amount by reason of a deduction made by the company or where a dividend is declared as "tax free," which is equivalent to giving the shareholder the right to such a sum as after deducting the appropriate amount will produce the net tax-free dividend in fact paid.

Per Lord Wright. The argument ab inconvenienti is of weight when the words to be construed are equally open to one or other of two constructions; but not when the construction is settled.

Inland Revenue Commissioners v. *Pearson and Pratt* [1936] 2 K. B. 533 overruled.

Ashton Gas Co. v. *Attorney-General* [1906] A. C. 10 distinguished.

Neumann v. *Inland Revenue Commissioners* [1934] A. C. 215 applied.

Decision of the Court of Appeal [1938] 2 K. B. 109 reversed.

APPEAL from a decision of the Court of Appeal. (1)

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on November 18, 1935, Mr. A. E. K. Cull appealed against an assessment to sur-tax for the year ending April 5, 1934, in the sum of 70,637*l.*

Cull & Co. was an unlimited company having a share capital of 800,000*l.*, divided into 700,000 preference shares and 100,000 ordinary shares, all issued and fully paid. Mr. Cull was the holder of 20,000 ordinary shares of the company as well as of a large number of preference shares.

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(1) [1938] 2 K. B. 109.

* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

At a meeting of the directors (who were called partners in the company's articles of association) held on March 13, 1934, the following resolution was passed: "It was resolved that "the dividends on the 5 per cent. cumulative preference shares "for the four years to March 31, 1934, be paid on March 31, "1934, and that an interim dividend for the year to March 31, "1934, on the ordinary shares of 21*s.* per share be paid on "March 31, 1934, without deduction of income tax."

In his return of total income for the purpose of assessment to sur-tax for the year ending April 5, 1934, Mr. Cull included the sum of 21,000*l.* as being the dividend received by him on his holding of ordinary shares in the company. In making the assessment under appeal the Commissioners added the sum of 7000*l.* as representing income tax in respect of this dividend.

The dividend was not paid over to Mr. Cull in cash, but in respect thereof a sum of 21,000*l.* was credited to his personal account with the company on March 31, 1934.

In the company's profit and loss account for the year to March 31, 1934, a deduction was shown of the sum of 99,114*l.* on account of income tax before arriving at the figure 559,374*l.*, which was carried to the balance sheet as the balance of net profit. It was stated in evidence that owing to previous losses the company was not liable to be charged to income tax for the year ending April 5, 1934, and that the sum of 99,114*l.* was intended to be a reserve for income tax which would become chargeable in respect of the next financial year, which would be assessed on the basis of the company's profits for the year to March 31, 1934.

It was contended on behalf of Mr. Cull—(*a*) that the dividend on the ordinary shares of the company authorized by the resolution of March 13, 1934, was not a "tax free" dividend but a dividend of 21*s.* per share from which the company was entitled, but not bound, to deduct income tax; (*b*) that the dividend actually received by Mr. Cull was a gross and not a net amount, and, consequently, the provisions of s. 7, sub-s. 2, of the Finance Act, 1931, were inapplicable; (*c*) that the company not having deducted income tax from the dividend, no addition on account of income tax ought to be made.

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It was contended on behalf of the Crown—(*a*) that the dividend on the company's ordinary shares authorized by the resolution of March 13, 1934, was a "tax free" dividend, and that the addition of income tax to the amount actually received by Mr. Cull had been correctly made; (*b*) alternatively, that the dividend actually received by Mr. Cull had been paid out of a fund of income diminished by a reserve for income tax, and that the appropriate addition for income tax had been correctly made in accordance with s. 7, sub-s. 2, of the Finance Act, 1931.

The Special Commissioners who heard the appeal held that the words "without deduction of income tax" qualified the words "be paid" and meant that no deduction of income tax was to be made on payment of the 21*s.* per share. Accordingly they held that the dividend was not a "tax "free" dividend, that no income tax had been deducted by the company, and that no addition to the dividend should be made on account of income tax. They therefore reduced the assessment by the sum of 7000*l.*

Finlay J. and the Court of Appeal (Sir Wilfrid Greene M.R. and MacKinnon L.J., Romer L.J. dissenting) reversed the decision of the Special Commissioners, taking the view that a dividend on ordinary shares "without deduction of income "tax" must, having regard to s. 7 of the Income Tax Act, 1931, be regarded as a dividend consisting of a net sum after deduction of income tax, and therefore, for the purpose of sur-tax, tax was payable by the shareholder in respect of his dividend on an amount arrived at by ascertaining the sum which after deduction of income tax was equal to the dividend received by him.

Mr. Cull appealed to this House.

Millard Tucker K.C. and *Terence Donovan* for the appellant. The question is whether, in computing the total income of the appellant for the purposes of sur-tax, a dividend which he received in respect of ordinary shares held by him in the company and which was expressed to be paid "without "deduction of tax," is to be taken at the amount actually received by him, or whether there must be added to it a sum equal to the income tax calculated on the amount of the dividend. For the Crown it is said that the dividend paid in the terms mentioned, was equivalent to one expressed to be payable "tax free." We submit that is not so. There having been a deliberate resolution by the company not to deduct income tax, the amount to be considered for the present purpose is that which was actually paid to the appellant—namely 21,000*l.*, and not 28,000*l.* arrived at by what is called "grossing up." Sect. 7, sub-s. 2, of the Finance Act, 1931, upon which reliance is placed by the respondents, applies only, as we submit, where a company has declared a dividend of a particular amount, and has then paid in full satisfaction thereof a sum less than that figure by a sum equal to the tax thereon. In the Court of Appeal *Neumann* v. *Inland Revenue Commissioners* (1) was distinguished, but we submit that it is directly in point in favour of the contention we put forward. As Lord Tomlin there said (2) in reference to s. 7, sub-s. 2, of the Finance Act, 1931, it "in effect "provides that it is the gross amount before deduction which "is to be treated as the income for the purposes of the Acts. "If a deduction from the gross sum was authorized but was "not in fact made, as was the case here, there is in my opinion "nothing in the language of the sub-section which entitles "the Inland Revenue to treat the gross sum as being greater "than in fact it was." The decisions in *Attorney-General* v. *Ashton Gas Co.* (3) and *Inland Revenue Commissioners* v. *Pearson and Pratt* (4) can be justified on the ground that the companies in question declared the dividends "free of income tax."

[LORD ATKIN. If this House has already placed a construction on the language of the relevant section, there is an end of the matter.]

We say that the House in *Neumann's* case (1) has construed the section in the way for which we contend.

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(1) [1934] A. C. 215.
(2) Ibid. 230, 231.
(3) [1904] 2 Ch. 621; [1906] A. C. 10.
(4) [1936] 2 K. B. 533.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Crown. It is said for the appellant that the company by declaring a dividend "without deduction of income tax" has abandoned the right to deduct, so that the dividend paid is a gross sum and not a net sum after deduction of tax. That is not so. The words "without deduction of tax" bear the same meaning as "free of income tax," and a dividend so paid is a net dividend which for the purpose of sur-tax must be grossed up. *Attorney-General* v. *Ashton Gas Co.* (1) decided that when a dividend is paid without deduction of tax the shareholder receives a larger sum than that specified on the dividend warrant, and therefore in such a case there must be a grossing up. That is precisely the case here. With regard to *Neumann's* case (2) we submit that it should be confined to the very special facts there in question.

[LORD ATKIN. Reading the judgments in that case I cannot help thinking that the Lords who took part in the decision were expressing general principles, and were not limiting themselves to the special facts.]

Millard Tucker K.C. in reply. The *Ashton Gas Co.* case (1), which the Attorney-General treated as his sheet anchor, has been much misunderstood. What it decided was this, where a company declares a dividend and does not deduct tax, it is giving to the shareholder a greater sum in cash than it need do. Here the appellant received nothing more than the 21,000*l.* stated on the dividend warrant. *Neumann's* case (2) is a binding authority in favour of the appellant and is precisely in point.

The House took time for consideration.

1939. July 27. LORD ATKIN (read by LORD RUSSELL OF KILLOWEN). My Lords, this is an appeal from the Court of Appeal, the Master of the Rolls and MacKinnon L.J., Romer L.J. dissenting, who affirmed a decision of Finlay J. reversing upon a case stated by the Commissioners for Special Purposes the determination of the Commissioners. The appeal

(1) [1904] 2 Ch. 621; [1906] A. C. 10. (2) [1934] A. C. 215.

to the Commissioners by the present appellant was against an assessment to sur-tax for the year ending April 5, 1934, in the sum of 70,637*l*. The question that arises is said, no doubt correctly, to be one of importance to the Revenue. It was fully debated at the hearing, but inasmuch as it appears to me to be completely covered by a recent decision of this House I find it unnecessary to deal with many of the topics of discussion. The appellant was the holder of 20,000 ordinary shares in Cull & Co., an unlimited company having a share capital of 800,000*l*. divided into 700,000 preference and 100,000 ordinary shares of 1*l*. all issued and fully paid. The company carries on business as bankers and financiers. On March 13, 1934, the directors resolved " that the dividends "on the 5 per cent. cumulative preference shares for the four "years to March 31, 1934, be paid on March 31, 1934, and "that an interim dividend for the year to March 31, 1934, "on the ordinary shares of 21 shillings per share be paid "on March 31, 1934, without deduction of income tax." In making his return of total income for sur-tax purposes the appellant included the sum of 21,000*l*., his dividend on his holding of ordinary shares. The assessing commissioners added 7000*l*. as representing income tax in respect of this dividend, thus increasing the assessment to 28,000*l*. On appeal, the Commissioners for Special Purposes reduced the assessment by the sum of 7000*l*.; and it was this determination which was reversed by Finlay J. and gives rise to the present appeal.

My Lords, it is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company, and that it is thought inequitable to charge it again. At one time it was thought that the company in paying tax paid on behalf of the shareholder: but this theory is now exploded by decisions in this House: and the position of the shareholders as to tax is as I have stated it.

The company may, however, in declaring a dividend declare that it shall be paid tax free. Such a declaration is equivalent to giving the shareholder the right to such a sum as after making the deduction of the appropriate amount attributed to tax will produce the net tax-free dividend in fact paid. Such larger sum in truth represents the profit to which the shareholder has become entitled from the company: and is properly returnable in his total income for sur-tax purposes: just as the gross income from which deductions of the appropriate sum for tax has in fact been made on payment is true income and is duly returnable. The right of the company to make a deduction, which is not in fact tax, for it represents a sum which is neither chargeable on the shareholder nor payable by the company to the Inland Revenue, is given now by r. 20 of the General Rules applicable to all schedules of the Income Tax Act, 1918. The deduction is optional, and when it is made the result in the instances I have given, a dividend which is paid less the reduction, and a dividend which is declared to be tax free, is that the shareholder has suffered a deduction authorized by statute from a total sum which otherwise he would be entitled to receive in full. In 1927 sur-tax was substituted for super-tax: and one of the provisions made for arriving at the total income for purposes of sur-tax is contained in s. 39, sub-s. 2: "In estimating under the Income Tax Acts "the total income of any person any income which is charge-"able with income tax by way of deduction at the standard "rate in force for any year shall be deemed to be income of "that year. . . . ." That provision was not apt to cover the case of the deduction which a company is authorized under r. 20 to make when paying a dividend, for, as I have said, the dividend is not in fact chargeable with tax.

No doubt to avoid this, amongst other difficulties the Finance Act, 1931, contained the s. 7, sub-s. 2, upon which this case depends: "(2.) Subject as hereinafter provided a "dividend paid by a body of persons whether before or after

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"the commencement of this Act shall to the extent to which "it is paid out of such profits and gains as are mentioned in "sub-section 1 of this section be deemed for all the purposes "of the Income Tax Acts to represent income of such an "amount as would after such deduction of tax as is authorized "by the provisions of the said rule 20 be equal to the net "amount received."

The Crown contended that this sub-section on its true construction applied to all cases where a deduction was authorized to be made and was not confined to those in which a deduction had actually been made. In their submission, therefore, for the purposes of income it imputed to the person receiving a payment, in cases where no deduction had in fact been made, the receipt of a hypothetical sum calculated as though deduction had been made: what is now known in income tax slang as "grossed up." Whatever might have been said for this construction before 1934 it is impossible now to accept it; for by the decision of this House in *Neumann* v. *Inland Revenue Commissioners* (1) it was expressly held to be wrong. In that case the Salisbury House Estate, Ld., had been assessed to income tax upon the whole of its receipts from rents which happened to exceed the Sch. A assessment to which it had been assessed and paid tax. In the case of *Fry* v. *Salisbury House Estate, Ld.* (2), it was decided that the company were not assessable on receipts in excess of the Sch. A valuation. On the question being raised between the company and the Inland Revenue the company had placed to income tax reserve a sum equivalent to the amount of tax further demanded: and upon the case being decided in their favour they then distributed amongst the shareholders without any deduction the total sum as placed to reserve. In *Neumann's* case (1) the appellant was one of those shareholders. Originally the company had declared the dividend as being free of tax, and had sent the shareholders a cheque for 4275*l.* stating that it was equivalent to a gross amount of 5343*l.* 15*s.* The appellant had therefore returned the larger sum as part of his total income. Later the company withdrew and stated that they had erroneously described the dividend as tax free. Thereupon the appellant claimed to reduce his total income return alleging that neither the smaller nor the larger sum had to be included in his total income return and appealed against his assessment.

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(1) [1934] A. C. 215.

(2) [1930] A. C. 432.

The Special Commissioners decided against him. On appeal Finlay J. decided in his favour holding that the sum was not paid out of profits brought into the charge: the Court of Appeal decided against him. On appeal to this House it was held that the smaller sum had to be returned on the ground that it had been paid out of profits and gains brought into charge. But as to the larger sum it was held that s. 7, sub-s. 2, did not apply. All the learned Lords held that that sub-section did not operate unless there had been a deduction in fact. They were impressed with the apparent anomaly arising in the case before them from the fact that the whole sum divisible amongst the shareholders and distributed by the dividend in question was in fact paid to the shareholders, so that if there had been a "grossing up" of the dividend the shareholder would have had imputed to him an income to which he had not and never could have become entitled. Seeing that the contention of the Crown led to this result, the House came to the conclusion that the sub-section had not the wide meaning imputed to it. Each of the learned Lords construed the sub-section in its general application, and each of them came to the conclusion that it had no application to a case where in fact no deduction had been made. The language used appears to me to be quite free from any ambiguity or qualification.

Lord Tomlin said (1): "If a deduction from the gross sum "was authorized but was not in fact made, as was the "case here, there is in my opinion nothing in the language "of the sub-section which entitles the Inland Revenue "to treat the gross sum as being greater than in fact it "was."

Lord Warrington said (2): "I agree with my noble and "learned friend. In such a case as this, namely where no

(1) [1934] A. C. 215, 231.

(2) Ibid. 233.

"deduction is in fact made, there is no distinction between a "gross sum and a net sum. The actual sum paid, and not "some wholly fictitious sum, is therefore that which should "be included in the return of income."

Lord Wright said (1): " I think the claim of the respondents "fails because it ignores the word 'net' in sub-section 2. "That word involves the idea of deduction, which in this case "must be a deduction of tax. . . . . What was distributed, "being 4275*l*., was in my judgment the gross amount: the "company, though authorized to deduct tax from it, were "not bound to deduct it and did not in fact do so. I cannot "see any justification for describing the sum distributed as "a 'net amount' and hence I conclude that s. 7, sub-s. 2, "does not apply."

My Lords, I cannot think of words more apt to convey that the members of this House were putting a general construction on the words in question and that in their view where no deduction was in fact made the sub-section did not apply. The position where a "tax free" dividend was declared was not within the purview of the decision. The construction so authoritatively stated binds us as it bound the Courts below. I find no justification for limiting it to facts precisely similar to those existing in this instance, or to cases where it might be supposed that no deduction could be made. Still more without warrant is it to put a limited construction upon the decision of the House because of the untoward results to the Revenue which may result. I decline to embark upon the consideration of the question whether the decision was right or wrong; it binds me, and I necessarily accept it. If it leads to ill results, the effect can be remedied by legislation. It follows from what I have said that the cases of *Inland Revenue Commissioners* v. *Pearson* (2) and *Inland Revenue Commissioners* v. *Pratt* (2) were wrongly decided, and must be overruled. The appeal should be allowed, the orders of the Court of Appeal and Finlay J. should be set aside and the determination of the Commissioners for Special Purposes of the Income Tax restored.

(1) [1934] A. C. 215, 242, 243.

(2) [1936] 2 K. B. 533.

The appellant should have the costs here and in the Courts below.

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LORD RUSSELL OF KILLOWEN. My Lords, I agree with the motion proposed. I do not restate the facts.

Our decision in this case depends, in my opinion, and depends solely, upon what is the proper construction to be placed upon s. 7, sub-s. 2, of the Finance Act, 1931.

Rule 20 of the General Rules applicable to Schs. A, B, C, D and E enables a company, if it thinks fit, but does not compel it, before paying a dividend of its profits or gains "to be charged," to deduct "the tax appropriate thereto." The words "appropriate thereto" were subsequently made the subject of legislation by s. 39 of the Finance Act, 1927, which provided by sub-s. 1 that "such of the provisions of "the Income Tax Acts as provide . . . . that there may be "deducted from any dividend the tax appropriate thereto ". . . . shall have effect as if they provided that tax may "be deducted . . . . at the standard rate for the year in "which the amount payable becomes due . . . ."

Sect. 7 of the Finance Act, 1931, runs thus: "(1.) The "provisions of rule 20 of the General Rules, which authorise "the deduction of the appropriate tax from any dividend "paid by a body of persons, shall, in relation to a dividend "paid by any body of persons, whether before or after the "commencement of this Act, be construed as authorising the "deduction of tax from the full amount paid out of profits "and gains of the said body which have been charged to tax "or which, under the provisions of the Income Tax Acts, "would fall to be included in computing the liability of the "said body to assessment to tax for any year if the said "provisions required the computation to be made by reference "to the profits and gains of that year and not by reference "to those of any other year or period.

"(2.) Subject as hereinafter provided, a dividend paid by "a body of persons, whether before or after the commencement "of this Act, shall, to the extent to which it is paid out of "such profits and gains as are mentioned in sub-section 1 "of this section, be deemed, for all the purposes of the Income "Tax Acts, to represent income of such an amount as would, "after such deduction of tax as is authorised by the provisions "of the said rule 20, be equal to the net amount received ". . . ."

The first sub-section of this section brought the dividend now in question within r. 20, so as to enable the company, if it thought fit, to deduct tax; but it will be observed that while the amount which it could have deducted as the "tax "appropriate thereto" has been definitely fixed at the standard rate for the year in which the amount of the dividend became due, it is in no way comparable with the tax payable by the company itself.

The second sub-section is the crucial one in the present case, the sole question being, as I conceive, whether upon its true construction it does or does not apply to a dividend which is paid by a company without any deduction of tax having in fact been made by the company.

My Lords, in my opinion that very question was decided by this House in the case of *Neumann* v. *Inland Revenue Commissioners* (1), in which, as I read their opinions, all the noble Lords who took part in the debate expressed the view that the sub-section only applied to cases where a company after declaring a dividend of a stated amount, pays in satisfaction thereof a sum less than the stated amount of the dividend by a sum equal to tax thereon. In other words, that the sub-section only applies to cases in which what the shareholder receives is a "net amount," i.e., an amount reduced from a larger amount by reason of a deduction made by the company against the shareholder.

Lord Tomlin can have meant nothing else when he said (2): "The sub-section in effect provides that it is the gross amount "before deduction which is to be treated as the income for "the purposes of the Acts. If a deduction from the gross "sum was authorised but was not in fact made, as was the "case here, there is in my opinion nothing in the language "of the sub-section which entitles the Inland Revenue to

(1) [1934] A. C. 215.

(2) Ibid. 230.

"treat the gross sum as being greater than in fact it was." Lord Warrington of Clyffe agreed with Lord Tomlin. "In "such a case as this," he said (1)," namely where no deduction "is in fact made, there is no distinction between a gross sum "and a net sum. The actual sum paid, and not some wholly "fictitious sum, is therefore that which should be included "in the return of income." Lord Wright is quite explicit on the point. What was distributed was in his opinion the gross amount; and he continues (2) "the company, though "authorised to deduct tax from it, were not bound to deduct "it, and did not in fact do so. I cannot see any justification "for describing the sum distributed as a 'net amount,' and "hence I conclude that s. 7, sub-s. 2, does not apply. I "cannot treat the word 'net' as mere surplusage or as simply "meaning the actual amount, whether gross or net."

It was argued that the case was decided only upon its own special facts. I cannot assent to this view. It was a decision that the section on its true construction did not apply if no deduction had in fact been made by the company before payment. Indeed, as I read the case, if the word "net" had not been in the sub-section, the decision must have been in favour of the Crown.

I agree with the result which was reached by Lord Romer although there are some statements in his judgment with which I cannot concur. In particular I do not agree with the view that the cases of *Pratt* and *Pearson* (3) were rightly decided. But I do agree with the following passage which contains the grounds upon which he was prepared to allow the appeal—namely (4): "The only question, therefore, to "be determined in the present case is whether the dividend "falls within s. 7, sub-s. 2, ... In my opinion it does not. "The company has made it quite clear that it has made no "deduction for tax, it being expressly stated in the resolution "for the dividend that it should be paid 'without deduction "'of tax.' The amount received by the appellant cannot, "therefore, be regarded as being a net amount within the

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(1) [1934] A. C. 215, 233.

(2) Ibid. 243.

(3) [1936] 2 K. B. 533.

(4) [1938] 2 K. B. 135.

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"meaning of the sub-section as interpreted in *Neumann's* "case. (1) For these reasons I respectfully differ from "Finlay J. He thought that there was no difference between "the expression 'without deduction of tax' and 'tax free.' "In this I cannot agree with him. . . . . It is . . . . the "precise opposite of 'without deduction of tax.'"

My Lords, for the reasons which I have given I would allow this appeal and restore the reduction of the assessment which was made by the Special Commissioners.

Lord Macmillan. My Lords, it is now well settled that the shareholders of a company are not liable to be directly charged with income tax at the standard rate on the dividends which they receive from the company. It is also settled that dividends received by an individual must be brought into computation in ascertaining his total income for sur-tax purposes; they are a source of income within the meaning of s. 4 of the Income Tax Act, 1918. So far as income tax at the standard rate is concerned, dividends received by the shareholders of a company are regarded as franked by the payment by the company of income tax on its profits or gains. But companies are not liable to, and do not pay, sur-tax, which is levied only on individuals. Consequently dividends received by shareholders of a company are not franked, so far as regards sur-tax, by any payment of sur-tax by the company.

The present appeal relates to the question of the proper way of treating dividends in the individual taxpayer's return of his total income from all sources for the purpose of ascertaining his liability to sur-tax.

In making a return of his total income the taxpayer has to classify the items of his income under two main heads—namely, (1.) income not taxed at the source, and (2.) income taxed at the source. Income which has been received by the taxpayer without any deduction in respect of income tax is entered at the actual amount received as income not taxed at the source; income which has been received less a deduction

(1) [1934] A. C. 215.

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in respect of tax is income taxed at the source and must be entered at the gross amount before deduction of tax, for income tax paid or suffered is not a permissible deduction in computing total income.

A company on paying dividends to its shareholders is entitled but not bound to deduct income tax at the standard rate at the time of payment. If the company exercises this right and deducts the tax from the dividends which it pays, the shareholders must, on entering the dividends in their return of total income, add back the deducted tax to the net amount actually received. But what if the company does not exercise its right of deduction and chooses to pay its dividends without deduction of tax? Ought the shareholder (1.) to enter the actual sum received by him as income not taxed at the source, or ought he (2.) to enter such a sum as, after deduction of tax, would give the sum actually received, thus treating the dividends as income taxed at the source? That is the question which the present appeal poses.

Apart from the terms of s. 7, sub-s. 2, of the Finance Act, 1931, I cannot see any justification for the second of these alternatives. The dividend has been received by the shareholder without deduction of tax. Why should he add back tax which has not been deducted? Why should he treat as income taxed at the source income which has not been taxed at the source? But it is said that s. 7, sub-s. 2, of the Act of 1931 requires this to be done, and regards every dividend received, whether tax has or has not been deducted from it, as a "net amount received."

In my opinion this contention cannot be entertained by your Lordships in view of the decision of this House in *Neumann* v. *Inland Revenue Commissioners*. (1) I do not read that decision as turning on the special facts of the case. It is an authoritative interpretation of the meaning and effect of s. 7, sub-s. 2, of the 1931 Act, and it gives no countenance to the argument which has been advanced on behalf of the Inland Revenue at your Lordships' bar and which commended itself to the majority of the learned Lords Justices in the Court

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(1) [1934] A. C. 215.

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of Appeal. I do not feel called upon either to criticize or to justify the decision in *Neumann's* case (1), but I may at least say that it is consonant with the general scheme of computing income for tax purposes which I have outlined. One conception which found favour with the learned Master of the Rolls, I find myself, with the greatest respect, unable to accept as applicable to the interpretation of the critical sub-section. He suggests that a shareholder who receives a dividend from which the company has not deducted tax may in some cases at least be said to receive a "net amount" because he is receiving payment from a company which has already paid income tax on the fund out of which the dividend is paid. But the tax which the company pays on its profits and gains need not be the same either in rate or in total amount as the tax which it refrains from deducting in paying dividends to its shareholders without deduction of tax. The company has not suffered deduction of income tax from its profits or gains; it has paid income tax on its profits or gains. The divisible fund is diminished by that payment, no doubt, but this cannot properly be described as a deduction of tax at the source of the shareholder's dividend. The question of deduction or no deduction arises only when the company proceeds to distribute its dividends. I do not think that the word "net" in the sub-section can be read as equally applicable to the amount which the shareholder receives whether the company does or does not deduct tax. So to hold would be to treat the same word as having two quite different meanings.

The case of the so-called tax-free dividend does not arise, but as it has been discussed both in this House and in the Court of Appeal I may point out that such a form of dividend is unknown to the Income Tax code, which knows only dividends from which tax has been deducted at the source and dividends from which tax has not been deducted at the source. The expression has, however, been judicially interpreted to mean a dividend of such a sum as after deduction of tax gives the actual sum received. The tax-free dividend is not really a dividend of the amount received, but a dividend of a larger sum less the tax thereon. It is therefore treated notionally as income taxed at the source and in the return of total income must be entered at the gross amount which, less tax, gives the actual net amount received.

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(1) [1934] A. C. 215.

With these few observations I concur with your Lordships in holding that the appeal should be allowed.

LORD WRIGHT. My Lords, the question in this appeal is what is the effect of the judgment of this House in *Neumann* v. *Inland Revenue Commissioners.* (1) It was sought on behalf of the respondent to distinguish that decision on the ground that it did not lay down any general rule for the construction of s. 7, sub-s. 2, of the Finance Act, 1931, but was limited to the special facts of that case and should not be applied to the facts of this case. Such was in substance the contention before your Lordships of the Attorney-General, which succeeded before Finlay J. and the majority of the Court of Appeal, consisting of the Master of the Rolls and MacKinnon L.J. Lord Romer, in dissenting, agreed with the conclusion of the Commissioners for Special Purposes of the Income Tax Act. The question can be shortly stated to be whether a dividend of 21,000*l.* declared by Cull & Co., " without "deduction of income tax," could be treated for sur-tax purposes as though it had been a dividend of 28,000*l.* from which the company had deducted standard income tax of 7000*l.* The question may be stated in other words as being whether the sum of 21,000*l.* was a net sum which, under s. 7, sub-s. 2, was to be deemed to represent income of such an amount as would, after such deduction of tax as is authorized by the provisions of r. 20 of the General Rules, be equal to the net amount received. The contention on behalf of the appellant was that the decision in *Neumann's* case (1) was general, and was that the sub-section on its true construction did not apply unless there was in fact such an amount received as could properly be called a " net " amount, the word " net " being there used in the same sense as in s. 33 of the Finance Act,

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(1) [1934] A. C. 215.

1924. That section requires that a dividend warrant should be accompanied by a statement in writing showing (1.) the gross amount which after deduction of the income tax appropriate thereto corresponds to the net amount actually paid, (2.) the rate and amount of such tax, and (3.) the net amount actually paid. This can apply only to cases where the deduction has been made, because under r. 20 the deduction is optional, not obligatory, and hence, if the company in paying the dividend does not choose to deduct the tax, the dividend so paid without deduction of tax cannot be a net amount, but must be a gross amount, and hence, it was contended, a dividend so paid without deduction of tax is in substance and not merely in words a different matter from a dividend paid after deduction of tax or tax free, both of which expressions have the same meaning. For instance, if standard income tax were payable by the appellant on his dividend of 21,000*l.*, it would be in this case on a sum of 21,000*l.*, whereas, if 21,000*l.* had been paid tax free or after deduction of tax, the gross sum, applying the computation just stated, would be 28,000*l.* This instance shows clearly the different effect of declaring a dividend tax free and declaring a dividend without deduction of tax. In the former event the tax-free dividend does not represent income on which the standard tax is to be charged, but such a sum of net income as would, if standard income tax, say 7000*l.*, were chargeable, leave a net sum of 21,000*l.* On the other hand, an income of 21,000*l.* without deduction of tax would only pay at 5*s.* in the pound a tax of 5250*l.*

As I have come to the conclusion, after a careful consideration of the report in *Neumann's* case (1), that this House did give a decision on the general construction of the sub-section, and not a decision limited to the special facts of that case, it only here remains to decide if good reason is shown why the general construction of the sub-section declared by this House should not be applied in the present case. It is not competent for your Lordships to reopen a previous decision of this House on a point of law, even if on reconsideration it should appear to be erroneous, which I am far from thinking could be said

(1) [1934] A. C. 215.

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of the decision in *Neumann's* case. (1) Nor is it open to the Court of Appeal or to a judge of first instance to go behind the decision. A judgment of the House on an issue of law, whether unanimous or by a majority, is different from a mere expression of opinion or matter of observation not necessary for the case. It fixes the law which can then only be changed by Parliament. All I intend, therefore, to do in this opinion is to explain briefly what was actually decided, and to examine the grounds which are relied on for the contentions that the decision was one limited to special facts, and that the actual facts of the present case are distinguishable and necessitate a different conclusion. I shall therefore state first in summary form what I understand to have been the facts in *Neumann's* case (1) and the ruling of this House on the construction of the sub-section.

In *Neumann's* case (1) the Salisbury House Estate, Ld., had declared a dividend in favour of Neumann, a shareholder, in the form, "Gross amount of dividend 4275*l.*, income tax "appropriate nil, 4275*l.*" This dividend represented Neumann's share of a sum of 18,325*l.*, which the company had set aside to reserve out of profits to await the decision in the case of *Fry* v. *Salisbury House Estate, Ld.* (2) The company owned flats, and was taxed under Sch. A; but the Sch. A assessment came to much less than the actual rents collected. It was held by this House in *Fry's* case (2) that the Sch. A assessment exhausted the taxable capacity of the rents and that no further assessment to standard income tax was competent under Sch. D in respect of the amount by which the rents exceeded the Sch. A assessment. The company thereupon distributed in full to the shareholders the reserve fund of 18,325*l.* as an interim dividend. The question then arose as to the position of Neumann as a shareholder. There were two questions: first, whether he was assessable to surtax at all on the 4275*l.*, and secondly, if he were, whether he was assessable at 4275*l.*; or at 5343*l.* 15*s.* This latter sum was the amount which would, after such deduction of tax as is authorized by r. 20, have been equal to the net amount received.

(1) [1934] A. C. 215.

(2) [1930] A. C. 432.

On the first point this House held that the dividend was not directly or separately assessable to income tax in the shareholder's hands, but was still chargeable to sur-tax because it was income tax income which had been charged to tax. The assessment under Sch. A had charged exhaustively the whole of the rents, so that the company were entitled under r. 20 to deduct the tax appropriate thereto from the 18,325*l.* if they had been minded to do so, though they had not, but had distributed the gross amount. On the second point this House held that s. 7, sub-s. 2, of the Finance Act, 1931, did not apply because on the true construction of the sub-section it only applied to a net amount, whereas the 4275*l.* received by Neumann was a gross and not a net amount. The three Lords of Appeal who took part in the decision were unanimous and their opinions agreed in substance in all respects. It will be enough here to quote the following passage from the speech of Lord Tomlin (1) who gave the leading opinion: " The sub-section in effect provides that it "is the gross amount before deduction, which is to be treated "as the income for the purposes of the Acts. If a deduction "from the gross sum was authorized but was not in fact "made, as was the case here, there is in my opinion nothing "in the language of the sub-section which entitles the Inland "Revenue to treat the gross sum as being greater than in "fact it was." Lord Warrington agreed. I may perhaps be permitted to quote from the speech which I delivered a short passage (2): " What was distributed, being 4275*l.*, was in my "judgment the gross amount; the company, though authorised "to deduct tax from it, were not bound to deduct it and did "not in fact do so. I cannot see any justification for describing "the sum distributed as a ' net amount,' and hence I conclude "that s. 7, sub-s. 2, does not apply. I cannot treat the word "' net ' as mere surplusage or as simply meaning the actual "amount, whether gross or net."

I must resist the temptation to develop the reasoning on which this conclusion was based. It is to be found in the report in Appeal Cases. I may, however, add that s. 7, sub-s. 2,

(1) [1934] A. C. 215, 230. (2) Ibid. 243.

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is dealing with a conventional "grossing up," as it is called, but when it comes to the amount received, that must necessarily be a fact. The sub-section does not say that the amount received is to be deemed to be net whether or not in fact deduction has been made. If the purpose of the Act is to secure that the shareholder pays sur-tax by "grossing up" whatever amount he receives in fact, whether the company has deducted tax or not, they could effect this result by a simple change of language or by making it compulsory in every case for a company to deduct tax under r. 20, and thus avoid payment of dividends without deduction of tax. It might seem that the framers of s. 7, sub-s. 2, had overlooked the optional terms of r. 20. But I do not pursue the subject, as all that I am concerned at the moment to do is to point out that the decision in *Neumann's* case (1) was directly and expressly based on the construction of the language of the sub-section. This House having in precise terms determined the construction has fixed the law, which can only be changed by the Legislature.

I shall now examine in a little more detail the contention strongly urged on behalf of the Crown that the decision in *Neumann's* case (1) was not based on the general construction of the sub-section, but on the special facts of the case. I find it difficult to see how that contention can be seriously maintained in view of the precise language quoted above from the speeches of the Lords in which the crucial and decisive conclusion is finally stated. Now, it is true that the facts in *Neumann's* case (1) were in some respects special. The directors were distributing 18,325*l.* which had been specifically set aside as a reserve in case the company were held liable for the extra tax. In the event it was not required. The company might in paying the amount have deducted the tax when they distributed it, because it was paid out of charged profits. In that case they would have properly deducted the tax in *Neumann's* case (1) from 4325*l.*, not from 5343*l.* 15*s.*, because they were only distributing and paying 18,325*l.* in all, of which 4325*l.* was Neumann's share. It is with this aspect in mind that Lord Tomlin says: (2) "Now I think

(1) [1934] A. C. 215.

(2) Ibid. 230.

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"it would be repellent to most minds that the appellant should "be charged as a part of his income with a sum which not "only has never come to him, but has never existed in fact. "It is plain that the respondents' cross-appeal, which seeks to "treat the sum of 4275*l.* as a net sum, corresponding to a gross "sum of 5343*l.* 15*s.*, assumes that the amount divisible by the "company was something in excess of anything they ever "had to divide." Lord Warrington and I make similar observations. But it is clear on a perusal of the speeches that this matter was not the ratio decidendi. I said (1): "however anomalous the claim it must receive effect if the "actual language of the section so requires." The final conclusion in all three speeches was based expressly on the actual language of the sub-section. In every case it is for the company to decide (subject no doubt to certain considerations of company law, and of policy) what sum they will set aside to declare and distribute by way of dividends. This becomes the divisible fund for this purpose. The company can also decide if the fund is to be distributed as gross or net. In *Neumann's* case (1) it does not appear that the company had not adequate funds outside the 18,325*l.*, or that they might not, if so advised, have distributed 18,325*l.* as a tax free sum or as a sum, after deduction of income tax, in which case the nominal amount of distribution would be the larger or gross sum necessary to represent a net sum of 18,325*l.* after deduction of the appropriate tax. There is nothing peculiar in the facts in *Neumann's* case (1) except the particular circumstances and reasons which led to the setting aside of the fund and made it natural to divide it in full. Though notionally they had paid tax on it, they had not done so in a business sense. In the speeches in this House, this aspect was merely emphasized to point the moral that dividends declared without deduction of tax may exhaust a special fund set aside to meet them. The peculiarity in *Neumann's* case (1) was that the fund set aside had borne the tax only in a notional and not in a business sense. But a company in setting aside out of profits a sum for payment of dividends can always, even if all the profits have been taxed in full, disregard that fact and decide not to deduct tax under r. 20. If a declaration of dividend is made " without deduction of tax " as it may be under r. 20, and if " gross " and " net " mean what they mean in s. 33 of the Finance Act, 1923, the dividend is gross even though it is paid out of taxed profits, which in another sense may be called net, and there is no scope for " grossing "up " (as it is called) what is already " gross." That can only logically be done when the dividend is declared as a "net " dividend, that is after deduction of tax or tax free. It can then properly be " grossed up " to the larger amount as specified in s. 7, sub-s. 2. It is true that the practice of declaring a gross dividend and then deducting the appropriate tax does not affect the sum which the shareholder receives. The same is true of a tax-free dividend as it is also indeed of a dividend without deduction of tax. But owing to the language of the Acts it does affect the sur-tax.

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(1) [1934] A. C. 215, 242.

I can now pass to consider the case under appeal. The company in that case had made in the year of assessment large profits, which were not in that year liable to assessment. They did, however, set aside 99,114*l.* as a reserve because these profits would be brought into computation and would attract tax in the following year. That left 559,374*l.* which was carried on the balance sheet as a balance of net profit. It was the balance of profit and gains, though in fact it had paid no tax. Out of that sum various appropriations were made, in particular a sum of 105,000*l.* to satisfy an interim dividend of 21*s.* a share to be declared " without deduction of "income tax." The appellant having been assessed to super-tax on the basis of a " gross " or " grossed up " dividend at the rate of 28*s.* a share, succeeded in his appeal to the Commissioners for Special Purposes who held as follows : " In the "case before us it is contended on behalf of the Crown that in "the resolution of March 13, 1934, the words ' without "' deduction of income tax ' should be read as after deduction "of income tax and that the dividend is a ' tax free ' dividend. "In our opinion the words without deduction of income tax "qualify the words ' be paid ' and mean that no deduction on

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"account of income tax is to be made on payment of the "dividend of 21*s*. per share. Accordingly we hold that the "dividend is not a 'tax free' dividend, that no income tax has "been deducted by the company and that no addition to the "dividend should be made on account of income tax. We "accordingly reduce the assessment by the sum of 7000*l*."

In my opinion the Commissioners correctly applied to the facts of the case the law laid down by this House in *Neumann's* case. (1) I cannot see any distinction in the facts which is material to the question. The company's profits for the year were not assessable to income tax because there had been no profits of the trading in the previous year, but they would be chargeable in another year, that is, the following year, so that under s. 7, sub-s. 1, of the Finance Act, 1931, the company were authorized to deduct the tax, just as the directors might have deducted the tax if so minded in *Neumann's* case. (1) The dividends were thus notionally charged to tax. It is not necessary or relevant to speculate why the directors did not deduct tax; it is enough that in fact they did not do so. Nor is it material that the company had available profits of the year far in excess of the amount which they decided to distribute as dividend on the ordinary shares. The amount distributed in dividends may and generally will have no relation at all to the profits earned in the year; it may be taken in whole or in part from a reserve fund for the equalization of dividends or from any profits which have been earned in previous years and charged at a rate of tax different from the rate current when the dividend is declared; it may be a small proportion of the profits earned in the year. It is this want of correlation between the dividends and the profits of the year which has led to the provision of s. 39 of the Finance Act, 1927, which (inter alia) provides that the deduction if made on account of income tax shall be at the standard rate of the year of declaration, irrespective of the rate or rates at which the company paid tax on the profits, which may have accrued in other years. These are some of the circumstances which have led to the rule now well established and finally affirmed

(1) [1934] A. C. 215.

in *Neumann's* case (1) that the shareholder is not taxed under Sch. D in respect of that part of his income which consists of dividends. The profits have been charged to tax in the hands of the company and that fact is deemed to redound to his benefit. I have already explained why the special reason, which induced the company in *Neumann's* case (1) to set aside the special reserve, does not affect the position any more than does the special reason which in any case influences a company in deciding what part of its profits it will set aside for paying dividends. The essential fact is that in this case as in *Neumann's* (1) the company did not exercise its optional authority to deduct income tax, but paid without deduction.

It now becomes necessary to examine the reasons which induced Finlay J. and the majority of the Court of Appeal to reverse the decision of the Special Commissioners. As Finlay J. followed the decision of Lawrence J. in *Inland Revenue Commissioners* v. *Pearson*; *Same* v. *Pratt* (2), these cases must first be considered. The companies in these cases had not deducted tax in paying the dividends, though the dividends were paid out of profits charged to tax. It is not material that in the former case they were paid out of accumulated profits. The Special Commissioners in each of these cases held, as they did in this case, that the dividends paid were gross sums, and that s. 7, sub-s. 2, of the Finance Act, 1931, did not apply. The contention of the Attorney-General is summarized in the following terms (3): "Where the company's profits "have been taxed, as here, and the company has power to "deduct tax from the shareholders' dividends, the sum paid "is a net sum to which must be added for purposes of sur-tax "the amount of tax appropriate to the profits distributed in "dividend." I may note that the same might be said of the facts in *Neumann's* case. (1) Lawrence J. acceded to the contention of the Attorney-General, and reversed the decision of the Special Commissioners. He seems to have been influenced by the consideration that, if the decision of the

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(1) [1934] A. C. 215.
(2) [1936] 2 K. B. 533.
(3) [1936] 2 K. B. 533, 536.

Commissioners were right, any company could ensure that its shareholders should be taxable to sur-tax only on the actual amount received in cash, by the simple process of declaring dividends without deduction of tax. That may be the result of the decision in *Neumann's* case (1), but it follows from the fact that the deduction of tax by a company in paying dividends is optional, not obligatory. He seeks to distinguish *Neumann's* case (1) because in that case the tax was not charged "pound "for pound" on the profits distributed under Sch. A, whereas in the cases before him it had been charged "pound for pound" under Sch. D, at some time or another on the company's profits. But that distinction is immaterial; all that is material under r. 20 is that the profits should have at some time or other, duly borne the appropriate tax whatever it was. This was equally true in *Neumann's* case. (1) Lawrence J. also sought to distinguish *Neumann's* case (1) because the dividends paid exhausted the specially segregated fund, whereas that was not so in the cases before him. I have commented on that point, which in my opinion is not a true basis of distinction. The judge further held that the cases before him were governed by the *Ashton Gas Co.'s* case (2) and not by *Neumann's* case (1) at all. With the greatest respect for the learned judge, I am bound to say that I do not think that the *Ashton Gas Co.'s* case (2) throws any light at all on the problems now being considered. It was an entirely different case. It was not a tax case at all. The company there was a statutory undertaking, the special Act of which provided that the profits divisible in any year divided among the ordinary shareholders should not exceed a given rate. The company declared and paid a dividend at the full permitted rate without deducting tax, and in doing so obviously divided more of their profits than they would have done if they had paid the profits after deducting income tax, and exceeded the divisible rate. Buckley J. put the question thus (3): "The "whole question is: Are the profits thus divided among the "shareholders in excess of 10 per cent. on the capital? I

(1) [1934] A. C. 215.
(2) [1906] A. C. 10.
(3) [1904] 2 Ch. 621, 625.

"think they are. It is exactly as if the company declared a "dividend of 10 per cent., and the amount of the income tax, "so that when the statutory deduction of the income tax is "made the shareholder shall have a clear 10 per cent." This decision was affirmed by the Court of Appeal and the House of Lords. Lord Halsbury said it was perfectly clear. The question was simply whether the company was dividing more of its profits in paying the dividends than it was permitted to do. It was held in effect that, in arriving at the permitted rate of dividend, the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of the income tax on the profits proposed to be divided. It cost the company more profits to pay 10 per cent. without deducting income tax than to pay 10 per cent. less income tax. When Lord Wrenbury in *Bradbury* v. *English Sewing Cotton Co.* (1), concisely, though not with all necessary qualifications, expressed the now accepted view of the immunity of a shareholder in regard to income tax in the words, " the "corporator bore his share of the tax by the deduction of the "appropriate share of the collective tax paid by the corporation "from his dividend," he showed no consciousness that he was contradicting what he had said in the *Ashton Gas Co.'s* case. (2) I cannot see how that case throws any light on the true construction of s. 7, sub-s. 2, of the Finance Act, 1931. It was cited to this House in *Neumann's* case (3), but no member of the House thought fit to refer to it. I think that on such questions as have to be considered here, it should be disregarded once and for all. I observe that the *Ashton Gas Co.* (2) decision is not mentioned in any of the judgments in the Court of Appeal in the present case.

With all deference to the learned judge I cannot but think that the cases of *Pearson* and *Pratt* (4) were wrongly decided.

Finlay J. followed the decision of Lawrence J. He attached importance to the *Ashton Gas Co.'s* case (2), and seemed to emphasize expressions to be found in that case to the effect that the shareholder who gets 10 per cent. on his share gets not merely 10*l*. but an immunity from tax. That, I think, is inconsistent with the settled principle that a dividend is not directly assessable to tax on what the shareholder is paid. The actual amount which he is paid differs according as the company does or does not deduct tax in paying, but what is paid is in itself immune from standard tax in the shareholder's hands. He needs no added immunity. Finlay J. also finds himself unable to draw a distinction between the words "free "of income tax" and the words "without deduction of tax." But I venture to think that the distinction was clearly pointed out by the House of Lords in *Neumann's* case (1) in the sense which I have explained above. I cannot with respect assent to the reasoning of Finlay J. any more than to that of Lawrence J., whose judgment he followed.

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(1) [1923] A. C. 744, 766.

(2) [1904] 2 Ch. 621.

(3) [1934] A. C. 215.

(4) [1936] 2 K. B. 533.

The judgment of Finlay J. was affirmed by the Master of the Rolls and MacKinnon L.J. The Master of the Rolls is impressed by the far-reaching results of the decision in *Neumann's* case (1), which, he says, the Legislature can scarcely have intended. I venture to repeat the comment on this contention which I made earlier in this opinion. The argument ab inconvenienti is no doubt of weight when the words of the Act are equally open to one or other of two constructions, but once the construction is settled, the argument becomes inadmissible. It is no doubt true that the purpose of the Legislature may have been to bring into sur-tax by means of the shareholders' dividends the profits of the company which in the hands of the Company are not subject to sur-tax, but the steps taken to achieve that result have been opportunist and lacking in a clear or comprehensive scheme. I am almost tempted to say that the draftsmen may have overlooked that a dividend might be not merely tax free or under deduction of tax, but without deduction of tax, that is, might be either gross or net though in either case it is paid out of taxed profits of the company. If the consequences of the *Neumann* decision (1) are so serious, it is for the Legislature to change the law. Nor can I agree with the view of the Master of the Rolls that the dividend is net whenever it is paid out of profits

(1) [1934] A. C. 215.

which have suffered payment of tax. This, I think, involves in another form the failure to distinguish between the company's profits and the tax on them on the one hand and on the other hand the dividend and the sur-tax on it. A dividend paid out of net profits of the company (as it must generally be) can be either gross or net, according as it is paid tax free or without deduction of tax. In such latter cases the question is between the shareholder and the Revenue. The payment by the company of its income tax is a matter between the company and the Revenue. A dividend is not net, because it is not independently chargeable to standard tax. Nor do I agree with the Master of the Rolls in his view that the language in *Neumann's* case (1) was used with specific reference to the fact that to "gross up" the dividend in question would have involved the false assumption that the total fund of profits which the company had to distribute was greater than in fact it was. That fact, though naturally adverted to in the speeches in this House, was, as I have explained, in truth irrelevant to the general construction of the sub-section. The Master of the Rolls further was of opinion that as, in the present case, the dividend paid amounted to far less than the total profits which the company had to distribute, there was no difficulty in regarding the amount received by the appellant as a net amount. With the utmost respect, the matter seems to me to be irrelevant. I cannot, as I have explained, hold that it is in any sense material to the question at issue whether the company distributed the whole or a greater or less proportion of its available fund of profits. All that is material is whether the company declared the dividend as with or without deduction of tax. I think the word "deduct" or "deduction" is used both in r. 20 and in the material sections of the Finance Acts of 1927 and 1931 in its ordinary sense of a sum being declared, a sum taken away from it, and a smaller sum left to be paid. It is true that in the result the process only affects the sur-tax payer. But if there is no deduction under r. 20, there is a case in fact to which by its terms s. 7, sub-s. 2, does not apply. The judgment of MacKinnon L.J.

(1) [1934] A. C. 215.

does not differ in substance from that of the Master of the Rolls, and accordingly I need not repeat what I have already said as to the reasons why, with all deference, I feel constrained to take a different view. It will also be apparent from what I have already said that while I agree with the conclusion of my noble and learned friend, Lord Romer, there are certain matters on which I do not see eye to eye with him.

I think the appeal should be allowed.

LORD WRIGHT. My Lords, my noble and learned friend Lord Porter authorizes me to say that he agrees with the opinions which have been delivered in this appeal.

Appeal allowed.

Solicitors for appellant : *Freshfields, Leese & Munns.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

BARNES (INSPECTOR OF TAXES) . . . . APPELLANT;

AND

HELY HUTCHINSON . . . . RESPONDENT.

H. L. (E.)*

1939

June 22, 23, 26; *July* 27

Revenue—Income tax—Preference shares in company out of United Kingdom owning shares in companies in United Kingdom—"Double taxation"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.—All Schedule Rules, r.* 20.

The respondent was the beneficial owner of preference shares in a company registered in Calcutta carrying a fixed cumulative dividend of 8 per cent. per annum. That company was the beneficial owner of ordinary shares in two British companies whose profits were assessed to United Kingdom income tax, the tax being deducted by the companies from the dividends on their ordinary shares. It was agreed that 44·12 per cent. of the dividend paid by the Calcutta company on its preference shares was paid out of the dividends received from the British companies which had already suffered taxation. The preference share dividend was paid direct to the respondent in full:—

Held, that the respondent was properly assessed on the full amount of the preference dividend received by him from the company, and that such assessment did not involve double taxation.

Per Lord Wright. Whatever the precise scope of the rule against double taxation is, it must at least involve that it is the same income, that it is the same person in respect of the same piece of income that is being doubly taxed, whether directly or indirectly, and that the double taxation is by British assessment.

Gilbertson v. *Fergusson* (1879) 5 Ex. Div. 57; (1881) 7 Q. B. D. 562 distinguished.

Decision of the Court of Appeal [1939] 1 K. B. 93 reversed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Lawrence J. (2) on a case stated by the Income Tax Commissioners for the City of London.

At a meeting of the Commissioners the respondent appealed against an assessment to income tax made upon him under

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(1) [1939] 1 K. B. 93. (2) [1938] 1 K. B. 469.

**Present*: LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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the rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, for the year ending April 5, 1933, in the sum of 6045*l*.

The respondent was the beneficial owner of 525 preference shares of Rs.1000 each in George Henderson & Co., Ld. (hereinafter called " the company "), which was registered in Calcutta. Those preference shares were entitled to a fixed cumulative dividend at the rate of 8 per cent. per annum. In addition to its preference capital the company also had issued ordinary share capital. The company was the beneficial owner of a large number of ordinary shares in two companies registered in England, namely, the Barngore Jute Factory Co., Ld., and the Hunwal Tea Co., Ld. (hereinafter called "the British companies"). The whole of the profits of the British companies were assessed to United Kingdom income tax.

During the year ending April 5, 1931, the company received dividends upon its ordinary shares in the British companies amounting in Indian money to Rs.1,15,143. These dividends were paid out of profits of the British companies which had borne United Kingdom income tax, and such tax was deducted by the British companies from the dividends in question.

These dividends were applied by the company, together with other income which had not borne United Kingdom income tax, for the purpose of paying a dividend of 8 per cent. upon the preference shares of the company. It was agreed that 44·12 per cent. of the said preference dividend was paid by the company out of the said taxed dividend received from the British companies. The said dividend upon the preference shares of the company was paid in full without any deduction for income tax on June 22, 1931, and the respondent received as and for the dividend due to him the sum of Rs.42,000. That dividend was paid by the company by means of dividend warrants sent direct to the shareholders, without the intervention of any paying agents. Included in the assessment now under appeal was the full amount of the dividend so received by the respondent.

It was contended on behalf of the respondent that such part of the said dividend as was paid out of profits and gains which had already borne United Kingdom tax (namely 44·12 per cent.) could not again be subjected to the same tax, and that the assessment should be reduced accordingly.

It was contended on behalf of the appellant that the respondent was properly assessed under r. 1 of Case V. on the full amount of the preference dividend received by him from the company; that the assessment did not involve "double taxation" in that the respondent and the company were respectively chargeable as separate entities in respect of separate sources of income; that the relief in *Gilbertson* v. *Fergusson* (1) was given on equitable grounds and that such grounds did not exist in the present case where the income assessed was in respect of a fixed preference, as contrasted with an ordinary, dividend; that there was no reason in law or in equity why a preference shareholder in a foreign company should not suffer taxation on the full amount of the preference dividend he received, since a preference shareholder in an English company would suffer taxation by deduction at the source; and that the present case was distinguishable from *Gilbertson* v. *Fergusson* (1) by reason of the fact that there the company paying the dividends was the same as the company whose English profits had already been taxed, whereas in the present case there was the interposition of the Indian company, having no direct trading connection with this country, whose profits had not been directly assessed to United Kingdom income tax.

The Commissioners held that they were bound by the decision in *Gilbertson* v. *Fergusson* (2), and that the appeal of the taxpayer must be allowed as regards such part of the dividend in question as was paid out of profits and gains which had already borne United Kingdom income tax.

The Crown appealed.

Lawrence J. held that the principle against double taxation applied, and therefore that the agreed proportion of the preference share dividend which had already suffered income tax could not again be subjected to the same tax. Lawrence J.'s judgment having been affirmed by the Court of Appeal, the Crown now appealed to this House.

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(1) 5 Ex. Div. 57; 7 Q. B. D. 562.

(2) 7 Q. B. D. 562.

Sir Donald Somervell A.-G. and *Reginald Hills* for the appellant. It is said that inasmuch as part of the profits of the foreign company in question consisted of dividends of an English company on which income tax had been paid the respondent is under no liability for the tax now claimed. In support of this contention reliance is placed on *Gilbertson* v. *Fergusson.* (1) In that case the facts were that a foreign company carrying on business and earning profits abroad had an agency in London which earned profits enabling it to pay the dividends without requiring or obtaining any remittances from abroad. The London Agency was assessed to income tax on the profits earned in the United Kingdom and it was held that the company ought only to be further assessed in respect of that portion of the dividend which represented profits earned out of the United Kingdom. To have held otherwise would have involved double taxation. That case is therefore distinguishable. Here there are two different companies, and therefore it cannot be said that there is double taxation of the same income. The case is really decided by the express words of r. 1 of Case V., which provides that " the tax in respect of income arising from "stocks, shares or rents in any place out of the United "Kingdom shall be computed on the full amount thereof . . . . "whether the income has been or will be received in the United "Kingdom or not . . . ." Moreover, the respondent's income from his preference shares was in no way diminished by the taxation of the profits of the English company, seeing that he received in full the 8 per cent. dividend to which he was entitled.

Roland Burrows K.C. and *Terence Donovan* for the respondent. The decision in *Gilbertson* v. *Fergusson* (2) was based on the principle that there should be no double taxation of the same income, and, notwithstanding some observations of Lord Phillimore in *Bradbury* v. *English Sewing Cotton*

(1) 7 Q. B. D. 562. (2) 5 Ex. Div. 57; 7 Q. B. D. 562.

Co. (1) tending to impugn that principle, it is well founded, and is still applicable. Here the foreign company in question did not carry on business in this country, and what they have paid in dividend has been paid out of a fund which has already borne tax and therefore the respondent is entitled to say that he cannot be required to pay tax again on it.

[LORD ATKIN. The respondent has not been called upon to pay tax twice over.]

We submit that it is not accurate to say that the same individual has not suffered, seeing that the amount distributable in dividends has been diminished by reason of the tax. The Court is entitled to look behind the dividend and see what it really is. If it is really a share of profits and gains already brought into tax, it cannot be taxed a second time. That is implicit in the decision of this House in *Bradbury* v. *English Sewing Cotton Co.* (1)

Sir Donald Somervell A.-G. in reply. In *Attorney-General* v. *London County Council* (2) Lord Loreburn L.C. said: "It is "said that the effect of this conclusion will be to tax the "same income twice over. I cannot see this. The county "council pays tax on 118,000*l.* annual value of their own "land which they occupy. The holders of Consolidated "Stock pay tax on 118,000*l.*, annual interest of the debt due "to them from the county council. It seems to me that the "two incomes are different, the persons who receive "and enjoy them are different, and the persons who pay "income tax on these two incomes respectively are also "different." That we contend is applicable in this case. Double taxation we say only takes place when it is the same shareholder and the same income that are so taxed.

The House took time for consideration.

1939. July 27. LORD ATKIN (read by LORD RUSSELL OF KILLOWEN). My Lords, this is an appeal from the Court of Appeal affirming a decision of Lawrence J. who dismissed an appeal from the Commissioners for the General Purposes of the Income Tax for the City of London, who had allowed an appeal by the respondent against an assessment for income tax. It will thus be seen that the Inspector of Taxes has been held to be wrong all along the line. Nevertheless, I venture to think that he is right, and that his appeal should be allowed.

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(1) [1923] A. C. 744.

(2) [1907] A. C. 131, 134.

The respondent is the holder of 525 preference shares of Rs.1000 each in George Henderson & Co., Ld., entitling the holder to a fixed cumulative dividend at the rate of 8 per cent. per annum. The company is registered in Calcutta and has also issued ordinary share capital. It is the holder of ordinary shares in two companies registered in England, the Barnagore Jute Factory Co., Ld., and the Hunwal Tea Co., Ld. The whole of the profits of these British companies were assessed to British income tax and when they paid dividends to George Henderson & Co., Ld. (the Indian company), they deducted the appropriate amount of tax according to r. 20 of the Miscellaneous Rules applicable to All Schedules. The Indian company also received income which had not suffered deduction for British income tax, the proportion of taxed to untaxed income for the year in question was for this case agreed to be 44·12 to 55·88. The respondent on June 22, 1931, was paid as dividend upon his preference shares the sum of Rs.42,000. It was paid to him direct by the company and without any deduction for income tax. He was assessed under r. 1, Case V., on the full amount of the dividend. He contended that such part of the dividend as was paid out of profits and gains which had already borne British income tax (i.e., 44·12 per cent.) could not again be subjected to British income tax and that his assessment should be reduced accordingly. It is this contention which has been successful in the Courts below.

The position of a shareholder in a foreign company so far as income tax is concerned is entirely different from that of a shareholder in a British company. So far as the latter is concerned he is not liable to be charged or assessed for income tax on his dividends at all; though he is liable in respect of them for sur-tax. The position of such a shareholder has

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been discussed in the case recently heard of *Cull* v. *Inland Revenue Commissioners* (1), and need not here be further expounded. But the shareholder in a foreign company is charged under Sch. D, i.e., in respect of the annual profits or gains arising to any person residing in the United Kingdom from any property whatever whether situate in the United Kingdom or elsewhere and specifically under Case V., "tax "in respect of income arising from possessions out of the "United Kingdom," and the first rule applicable to Case V., "The tax in respect of income arising from stocks, shares or "rents in any place out of the United Kingdom shall be "computed on the full amount thereof on an average of the "last three preceding years as directed in Case I. whether "the income has been or will be received in the United "Kingdom or not . . . ." The provision as to the three years' average has been altered by s. 29 of the Finance Act, 1926, by substituting the amount of the preceding year. It is obvious, therefore, that as far as the statute is concerned the respondent was chargeable on the whole dividend received: and it is not suggested that his claim to an abatement rests upon any statutory provision. His case depends upon a decision of the Court of Appeal in *Gilbertson* v. *Fergusson.* (2) In that case the persons charged were members of the English committee of the board of directors of the Imperial Ottoman Bank, a Turkish corporation who carried on business in this country and abroad. The management of this business in this country was entrusted to the English members of the general committee of management, who would correspond to the board of directors. The bank earned profits both in this country and abroad: and on the profits made in this country the bank was charged with income tax through the English committee who were in fact the parties assessed. Dividends were declared out of the total profits of the bank: and the dividends due to British shareholders were paid to them by the English committee. In respect of dividends so paid the English committee were assessed to income tax under the provisions of the Income Tax Act, 1842, s. 2, and the Act of 1853, s. 10, which provided that all persons entrusted with the payment of dividends were to pay the duties on the dividends on behalf of the persons entitled to the same out of the moneys in their hands. In respect of this last assessment the London committee complained that they should not be assessed upon the whole of the dividends paid by them to the English shareholders but only on a proportionate part, namely, the proportion that the profits made abroad bore to the profits made in England: for they said on the profits made in England tax had already been paid to the Crown. I have omitted other subsidiary issues which do not bear upon the point in question. The majority in the Exchequer Division, Huddleston and Pollock BB., Kelly C.B. dissenting, and the Court of Appeal, Bramwell, Brett and Cotton L.JJ., accepted the view of the London committee that the assessment should be proportionately reduced. The reason for the decision appears from the judgment of Brett L.J. (1): "By "the statute the Government are entitled to receive the "income tax upon all the profits made in respect of the "business carried on in England, and also beyond that on all "dividends paid in England, whether in respect of profits "made in England or in Turkey. Now it may be true that "there are no specific words in this statute which point out "that the Government are not to receive the tax twice over, "but it would be so clearly unjust and obviously contrary to "the meaning of the statute that the Government should "have the tax payable twice over by the same person in "respect of the same thing, that I should say it was a "necessary implication that that could not be right." Cotton L.J. said (2): "It must be conceded that if there "are any shareholders who reside in England and receive "dividends there they are chargeable under the Act, and are "bound to make a return and pay the tax on what they so "receive. There is no exception in their case in respect of "so much of their dividends as is attributable to or arising "in respect of profits made in England, but I take it there "would be this implied exception, that when duty is charged

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(1) Ante p. 51.

(2) 5 Ex. Div. 57; 7 Q. B. D. 562.

(1) 7 Q. B. D. 570.

(2) Ibid. 572.

"as against the person in one part of the Act he is not to "be charged again under another part applying no doubt in "terms to him, but intended to include those who have not "been charged under the preceding part."

It will be seen that there, as in the present case, the shareholders were liable to pay tax on foreign dividends though in that case the tax was paid "on behalf of them" by the persons entrusted with money to pay the dividends. As far as the company had been taxed on its profits made in England it seems to me plain that the reasoning proceeded on the theory then prevailing that the company paid tax on its profits on behalf of its shareholders, a theory which as was pointed out in *Cull* v. *Inland Revenue Commissioners* (1) can no longer be maintained. But it seems equally plain that the exception which the Courts were able to imply was based upon this very ground, the injustice that would prevail if the tax were payable twice over by the same person in respect of the same thing. Whatever the grounds of the decision it has stood to the present day, and the Attorney-General did not seek to dispute its validity in facts such as those found in that case. There has been much legislation in income tax matters since the date of its decision, and this House would hesitate long in these circumstances before infringing a decision of such long standing and so often acted upon. But does the decision affect the present case? In that case, no doubt, as in this, the shareholder was being charged in respect of dividends in a foreign company. In that case the foreign company had been directly charged with income tax on its English profits. In the present case the foreign company has not been, and could not be, charged with income tax on its dividends derived from the British companies. The fund out of which profits had been declared by the British company had no doubt been diminished by the incidence of the British tax; and the Indian company had suffered the deduction from their dividends in respect of "tax" which the British companies were entitled to make if they chose, the nature of which I have mentioned in *Cull's* case. (1) I think that this

(1) Ante p. 51.

distinction makes it difficult to apply the decision in *Gilbertson* v. *Fergusson* (1) now to the case of ordinary shareholders in the Indian company. Where does the inquiry end in the case of a shareholder in a foreign company? If he can inquire which of the dividends received by that company had suffered British tax, can he go on to inquire what proportion of those dividends were derived from income that had suffered tax and so on ad infinitum: and what fraction of a fraction of a fraction has eventually to be calculated and verified?

But even if the implied exception could be adopted for the ordinary shareholder I am at a loss to understand any reasons for its applying to a preference shareholder; or in what possible sense it can be said that to him an injustice has been done of making tax "payable twice over by the "same person in respect of the same thing." The preference shareholder who receives his full dividend has suffered nothing directly or indirectly. That a larger sum of profits out of which he receives his dividend is diminished by tax is nothing to him as long as there is sufficient left to pay him the sum which the company has contracted to pay. I can see nothing either unjust or contrary to the statute in exacting tax for the first time from him; and I think that his claim for a proportionate abatement fails.

I should add that I am not myself prepared to accept the view that some implied exception arises where a "fund" is taxed, a principle which appears to have found favour in the Court of Appeal and was much pressed before us on behalf of the respondent. Funds are not taxed; the analogy of one or more bags into which the Inland Revenue inserts its fingers seems to me with respect to be inaccurate. Persons are charged in respect of profits; and if they are to have the benefit of an implied relief from the plain words of the statute, it appears to me that it must be shown to be unjust for those persons to be taxed; in other words that either directly or perhaps indirectly they are being taxed twice. In the present case I think that the respondent on his full assessment will only be taxed once. I think therefore that the orders of the Court of Appeal and of Lawrence J. and the determination of the Commissioners for General Purposes should be set aside and that the original assessment in the sum of 6045*l.* should be restored. In accordance with the terms imposed when the Court of Appeal gave leave to appeal to your Lordships' House, the appellant should pay the costs here as between solicitor and client.

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(1) 5 Ex. Div. 57; 7 Q. B. D. 562.

LORD RUSSELL OF KILLOWEN. My Lords, I have been given the opportunity of considering the opinion which I have just read, and also the opinion about to be delivered by my noble and learned friend Lord Wright. They indicate exactly the views which I entertain on the subject of this appeal. It is merely from a desire to avoid repetition, and not from any want of respect for the Courts from which we are differing, that I content myself with concurring in the motion proposed without recording any separate opinion of my own.

LORD MACMILLAN. My Lords, I also concur.

LORD WRIGHT. My Lords, the respondent, a British taxpayer, has received Rs.42,000 or 3150*l.* remitted to him from India as dividends on 525 8 per cent. preference shares of Rs.1000 each in an Indian company named George Henderson & Co., Ld., resident and carrying on business in India. The company's profits for the year were as to 44·12 per cent. derived from dividends paid to the company by two British companies in which it was a shareholder. The profits of these companies had borne British income tax. The question in the appeal is whether the respondent is entitled to relief to the extent of 44·12 per cent. in respect of British income tax on the sum which he has actually received from India. He has succeeded in that contention before the Revenue judge and the Court of Appeal.

It would certainly seem strange that the respondent, who has received his 8 per cent. in full without any deduction either in England or in India, should not bear the same tax on this piece of income as any other taxpayer who is subject to British income tax. It is not suggested that there is any express statutory provision which reduces his liability. On the contrary, the words of Sch. D, r. 2, Case V., seem to provide specifically to the contrary effect. Case V. deals with tax in respect of income arising from possessions out of the United Kingdom. The preference shares in the Indian company are beyond question foreign possessions and the dividends are income arising from them. Hence under r. 1 of Case V., the tax in respect of that income is to be computed on the full amount thereof. It is not suggested that any deduction is permissible under r. 1 of Case IV., in respect of income tax in the place where the income has arisen or on any other ground. The contention which has found favour with the Courts below is that as the income of the Indian company has borne British income tax to the extent of 44·12 per cent., in the sense that dividends in these companies were paid under deduction of British income tax, the preference dividends received by the respondent must be held to have borne British income tax in the same proportion; otherwise, it is said, if it is now taxed in full it will be doubly taxed in the hands of the same person. The analogy is invoked of a shareholder in a British company who, according to the principle now well settled, is not taxed separately on his dividend to standard income tax. The dividend is deemed to have already borne tax, because tax has been paid on the company's profits as a whole. This rule is explained in *Neumann's* case. (1) Reliance is also placed on behalf of the respondent on *Gilbertson* v. *Fergusson* (2).

I do not think for several reasons that the analogy of dividends of an English company applies, and I see no sufficient ground in a case like the present for relieving the respondent from what is expressed to be his liability under Case V. I think the dividends in question are properly to be regarded as individual pieces of income, received by him in this country. I apply here the words of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co.* (1), which seem to me to describe accurately, at least in a case like this, the position of a British taxpayer who receives annual sums from foreign possessions, whether the foreign possessions are land or goods or shares in a foreign company. Lord Phillimore said as to the dividends (2): "The periodic sums which are "so remitted to him must be entered by him in his return, "and are liable to assessment and taxation, not because they "are dividends on shares in foreign companies, but simply "because they are remittances from foreign sources. The "officers of the Crown do not know and do not care what is "the character of the sources from which the money comes." I do not stop to inquire if this statement is universally applicable, but it is accurate at least in regard to preference dividends from a foreign company such as those in question here. I cannot see any sufficient ground to justify such exemption or abatement as the respondent claims. Preference dividends in an English company would generally be taxed by deduction under r. 20. The company is treated as having the right to deduct the appropriate tax because it is deemed to have franked the dividends in the hands of the shareholder by paying the tax on the totality of its own profits. If the English company does deduct tax under r. 20, as would be the case if the preference dividends were declared under deduction of tax or tax free, the dividends would be free of standard tax and equally if the dividends were declared without deduction of tax. But the same rule or fiction cannot in my opinion be applied to the dividends on these preference shares in the Indian company which are remitted in full to this country. It cannot be said that the Indian company has paid English tax on its profits or any part of them in such a way as to frank the preference dividends, in whole or in part in the hands of the English recipient. The rule or fiction has never been, nor can it be, extended so far. It is said, however, that the total fund of the Indian company's profits has been reduced because the dividends from its shares in the two British companies have been paid

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(1) *Neumann* v. *Inland Revenue Commissioners* [1934] A. C. 215.
(2) 7 Q. B. D. 562.

(1) [1923] A. C. 744.

(2) Ibid. 770.

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under deduction of British tax. That is true, but that does not mean that the actual dividends paid to the respondent were affected. All it means is that the divisible profits of the Indian company were proportionately less on that account. The Indian company did not directly pay any British tax or deduct anything on that account from the sums paid to the respondent. All these matters seem to me to be entirely irrelevant to him. He got the full amount of the dividends just as if the dividends from the two British companies had not been paid under deduction of tax. If as a result of the deduction of British tax on the dividends received from the British companies by the Indian company, the latter's net profits had been reduced so as not to suffice to pay the respondent his 8 per cent. dividends in full, the amount of the foreign remittances sent to him would or might be so much less. In that event his liability for income tax under Case V. would be proportionately reduced. It is contended that he is affected because the fund out of which his dividends are drawn is reduced to the extent that the Indian company's dividends on the shares in the British company were reduced by the deduction of British income tax. But the tax assessed on the respondent is not levied on the Indian company's fund of profits but on the foreign income arising from them to the respondent. That income is, in the facts of this case, completely unaffected. In truth, at least in a case like the present, the analogy of an English company is misleading. But even when what is being considered is the taxation of the dividends of an English company, it is not correct to say that it is anything but the shareholder's income as represented by the dividends which is taxed. The English company is taxed on the balance of its profits or gains, that is on its income; the shareholder is taxed on his own income. The shareholder is never taxed on the company's fund of profits, but only on the dividend which comes to him in payment of the debt which is created when the company declares the dividend. The tax is in every case on the individual's income, not on a fund possessed by another person, the company, even though it is the fund of profits of that company, from which the individual's income or part of it will be paid. The effect of rr. 19, 20 and 21 is in no way inconsistent with this fundamental principle, nor is the rule according to which English dividends are not separately assessable to standard income tax. This principle must not be obscured by reason of the circumstance that in the way already noted, the dividend is treated as franked by the tax paid by the company. The fund which is taxed in the hands of the company and the dividend which is declared by the company in favour of the shareholder are separate items for taxation law. It is only the latter which is the shareholder's income.

Notwithstanding the elaborate reasoning in the Court below, I cannot see any sufficient ground why the respondent should escape the full tax on these preference dividends.

The case of *Gilbertson* v. *Fergusson* (1) has been much relied on in argument. I do not desire to express any final opinion on the exact decision in that case, which differed from the present, because it dealt, not with preference, but with ordinary shares, and also because the Ottoman Bank, which was the foreign company, had been trading in England and had been directly taxed on the profits of its English trading. The claim in the action was two-fold, first a claim against the company represented by its London agency in respect of the profits of its English trading, and secondly a claim also against the London agency, in respect of the moneys entrusted to them to distribute as dividends to English shareholders. In the latter claim, the agency were in truth assessed as representing the English shareholders. It was held that the latter assessment should be reduced in respect of so much of the dividends as represented profits arising within the United Kingdom. But in that case the dividends were ordinary, and not preference dividends, so that the amount of the ordinary dividends might, in fact or in theory, have been reduced by the English taxation. There was the further difference that the Indian company, unlike the Ottoman Bank, was not carrying on business in England and was not directly assessable or assessed

(1) 5 Ex. Div. 57; 7 Q. B. D. 562.

in England. Its contribution to British taxation was indirect, in the sense that there had been the deduction made by the two British companies in paying their dividends to the Indian company. Thus it may be said that the Indian company occupied the same position for this purpose as did the English shareholders in the Ottoman Bank case, whereas the respondent is one stage more remote. The Indian company is interposed between the respondent and any question of British taxation on the Indian company's income. Logically the process of tracing back profits of a foreign company to ascertain if they have, however remotely, indirectly borne British tax, should not stop at a single stage, but I need not point out the practical difficulties of going back beyond the simple stage at which the foreign company has directly borne British tax. It is not, however, necessary here to examine *Gilbertson's* case (1) in principle or in detail. It raises questions perhaps of great importance but questions not material to this appeal. Your Lordships were told that it has been followed in practice and it has certainly stood for many years. If it is ever after this lapse of time to be reconsidered, that should be done, when occasion arises, where the facts are analogous. In the present case the circumstances are so different that a decision can be arrived at without finally exploring *Gilbertson's* case. (1)

I may add in conclusion that I do not think this case involves any question of double taxation. In Lord Davey's words in *London County Council* v. *Attorney-General* (2) "the Crown ". . . . cannot demand the tax twice over on the same income." Lord Davey illustrates the rule by instances such as those of mortgagee or annuitant, where the owner of the property and the annuitant are entitled to the income between them and if the Crown receives tax from the owner on the whole income, it has no further claim against the annuitant on whose account the owner is deemed to have paid as well as on his own. The same principle has been said, but not accurately, to apply to the case of dividends of an English company, a matter to

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(1) 5 Ex. Div. 57; 7 Q. B. D. 562.
(2) [1901] A. C. 26, 43.

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which I have adverted above. In *Gilbertson's* case (1), Brett L.J. said that it would be clearly unjust and obviously contrary to the meaning of the statute that the Government should have the tax payable twice over by the same person in respect of the same thing. Whatever the precise scope of the rule against double taxation, it must at least involve that it is the same income, that it is the same person in respect of the same piece of income that is being doubly taxed, whether directly or indirectly, and that the double taxation is by British assessment. In this case nothing of the sort can be predicated. The income in question is the amount of preference dividends received by the respondent. That income which is the income of the respondent, has not been taxed in India. If it is now taxed in England there cannot, in my opinion, be said to be double taxation. The British tax which the Indian company has indirectly borne on 44·12 per cent. of its profits, has not, in my opinion, been borne by the appellant in any sense.

With all respect to the distinguished judges who have in this case taken a different view, I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondent: *Sanderson, Lee & Co.*

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(1) 7 Q. B. D. 570.

[PRIVY COUNCIL.]

J. C.*

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July 7.

HAGAN AND OTHERS . . . . APPELLANTS;

AND

EFFUAH ADUM AND OTHERS . . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Succession—Claim to share of deceased native's estate and distribution—Jurisdiction of Native Tribunal—Construction of Ordinance—Appeal to wrong Court—Judgment of Native Tribunal final—Native Administration Ordinance, 1928, *c.* 111, *s.* 43, *sub-ss.* 1, 2; *ss.* 74, 75.

The respondents, as the domestic "slave-wife" and children of H., a native who died at Winneba in the Central Province of the Gold Coast Colony in 1931, by a summons initiated in the Native Tribunal of Winneba called upon the appellants, the brothers and sister of H., who had been granted letters of administration of his personal estate by the Divisional Court of the Central Province, to declare the value of the estate of H., and to show cause why their shares therein should not be designated. The Native Tribunal gave judgment in favour of the respondents for one quarter of H.'s real and personal estate:—

Held, first, that the suit was one "relating to the succession "to the property of any deceased native who had at the time "of his death a fixed place of abode within the State," within the meaning of head (*f*) of sub-s. 2 of s. 43 of the Native Administration Ordinance, 1928, and that the Native Tribunal had therefore jurisdiction to deal with the matter. Distribution of an estate comes within the meaning of the words of the section, and valuation of the estate is necessarily incidental to ascertainment of the shares for the purpose of distribution.

While each of the heads (*a*) to (*g*) in sub-s. 2 of s. 43 of the Native Administration Ordinance is subject to the provisions of sub-s. 1 of s. 43, each head in sub-s. 2 affords a self-contained subject of jurisdiction, which is independent of the other heads, and it is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads.

Held, also, that the application for letters of administration in the Divisional Court could not preclude any party from instituting proceedings before the Native Tribunal relative to distribution.

Held, further, that an appeal from a Native Tribunal on a matter relating to the succession of property is, under s. 74 of the Native Administration Ordinance, to be made to the Court

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* *Present:* LORD THANKERTON, LORD ALNESS, and LORD FAIRFIELD.

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of the District Commissioner, and that the appellants having appealed to the Court of the Provincial Commissioner under s. 75 of the Ordinance on the ground that the suit was one "relating to the ownership, possession, or occupation of any land," that Court had no jurisdiction to entertain the appeal, and that therefore, in the absence of notice of appeal under s. 74 within the prescribed period, the judgment of the Native Tribunal was final and binding.

Judgments of the West African Court of Appeal affirmed.

CONSOLIDATED APPEALS (Nos. 82 and 137 of 1936) from (1.) a judgment of the West African Court of Appeal (December 19, 1935) affirming a judgment of the Court of the Provincial Commissioner of the Central Province of the Gold Coast Colony (July 12, 1935); (2.) a judgment of the West African Court of Appeal (December 21, 1935) reversing a judgment of the Divisional Court of the said Province (March 25, 1935).

Both appeals concerned the estate of one Thomas Hagan, deceased, a native, who died intestate at Winneba in the Central Province of the Gold Coast Colony on July 9, 1931. The appellants were the brothers and sister of the deceased, and were granted letters of administration of his personal estate on February 22, 1932, by the Divisional Court of the Province. The respondents Effuah Adum and her children claimed to be interested in the estate, both real and personal, as the domestic "slave-wife" and children of the deceased. The respondent Araba Tanuah claimed to be interested in the estate as the head of the family of the deceased.

The suit out of which the first appeal arose was brought in the Native Tribunal of Winneba by the respondent Adum, on behalf of herself and her children, and called on the appellants to declare the value of the estate of the deceased, and to show cause why her share, and that of her children, in the estate should not be designated.

In the second suit, initiated by writ of summons in the Divisional Court of the Central Province by the respondent Araba Tanuah against the appellants, she claimed as head of the family for herself, and on behalf of other members of the family, that an account should be taken of all the personal estate of the deceased which had come into the possession of, and under the control of, the appellants before and since the grant of letters of administration by the Court to the appellants and for an administration order to be made in regard to the estate.

The substantial questions raised were, first, whether the Native Tribunal had jurisdiction to entertain the proceedings arising out of the first suit, and, secondly, whether an appeal lay to the Court of the Provincial Commissioner of the Central Province from the judgment of the Native Tribunal.

The West African Court of Appeal (Kingdon C.J. (Nigeria), Webber C.J. (Sierra Leone), and Woolhouse Bannerman J.), affirming the decision of the Court of the Provincial Commissioner, were of opinion that the suit in the Native Tribunal did not relate to "the ownership, possession or occupation "of any particular piece of land within the meaning of s. 75 "of the Native Administration Ordinance, it only relates "generally to the question of how the estate, real and personal, "of the deceased man, Thomas Hagan, should be shared ; in "other words, it comes under sub-s. (*f*) and not (*c*) of s. 43, "sub-s. 2, of the Native Administration Ordinance" as a suit "relating to the succession to the property of any deceased "native . . . ." and was within the jurisdiction of the Native Tribunal.

In the second suit the West African Court of Appeal, reversing the decision of the Divisional Court, granted the respondent Araba Tanuah the relief she claimed.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

1939. June 13, 15. *Roger Pezzani* for the appellants. The issue raised by the respondents was not a matter for the Native Tribunal at all, but for the Court, which had granted the letters of administration. The present appellants having appealed against the judgment of the Native Tribunal to the Court of the Provincial Commissioner, the point was taken by the respondents that this was a succession, and not a land case, and that the District Commissioner and not the Provincial Commissioner, had jurisdiction to deal with it on appeal.

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The Provincial Commissioner held that "this action "is a suit relating to the succession of property, and "not a 'suit or matter relating to the ownership, pos-"'session or occupation of any lands'," and he upheld the respondents' contention. This was wrong, as it was a land case. The West African Court of Appeal have affirmed that decision. It is submitted that by her writ of summons the respondent Adum was asking the Native Tribunal to value the estate; the only Court authorized to do that was the Divisional Court which had granted the letters of administration; the valuation made by the Native Tribunal was in any event fantastic, and has been prejudicial to the appellants. Moreover, the suit instituted by Adum was misconceived, because her claim had been already referred to arbitration and was res judicata, an award having been made which determined the lis. Further, the Native Tribunal had no jurisdiction to try the suit, because (1.) Adum's money claim was not limited to one hundred pounds, and the judgment given exceeded that sum: s. 43, sub-s. 2 (*e*), of the Native Administration Ordinance, 1928, c. 111; (2.) the Native Tribunal had no right to try any suit relating to the ownership of lands situated outside the Paramount Chief's own State: s. 43, sub-s. (*c*); the appellants were not within the Native State, and not answerable to its jurisdiction: s. 43, sub-s. 1. As to the first point, the governing principle of s. 43 of the Native Administration Ordinance is that the Paramount Chief's Tribunal has a limited jurisdiction in respect of natives who go there for a declaration of their rights according to the native law of succession. Knowledge of native law is necessary to decide what the rights are to the succession, but is entirely unnecessary in connection with the valuation and distribution of the estate. In any event, after deciding questions of succession, the Native Tribunal went further, and decided questions of personalty and realty, and that was outside their jurisdiction. "Succession" means what is the status of the parties—does their status enable them to have a right in the succession. If the Board are of opinion that "succession" must have a wide meaning, and

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include valuation, and enable the Native Tribunal to apportion the estate, then nothing more can be said. The Native Tribunal having declared that Adum had some right in the succession, proceeded to quantify it; there has been a declaration for 3750*l.*, which exceeded the Native jurisdiction of 100*l.* Secondly, the declaration of the estate of the deceased showed immovables situated outside the boundaries of the Native State. This excluded the jurisdiction of the Native Tribunal. Thirdly, the appellants were not living in the Paramount Chief's State, and were not therefore answerable to his jurisdiction. The decision in *Mayor, etc., of London* v. *Cox* (1) throws some light on the point as to jurisdiction. To have a cause of action the plaintiffs have to satisfy the Court that they are properly entitled to share in the succession: *Bowler* v. *Barberton Development Syndicate.* (2) There could be no cause of action unless the respondent Adum and her children were entitled to a share of the deceased's estate according to Fanti law.

It is common ground that the property was self-acquired. According to Fanti law such property vested in the appellants to the exclusion of all others: *Mensah Larkai* v. *Amorkor alias Ashiety.* (3) [Reference was also made to Sarbah on Fanti Customary Laws, 2nd ed. (1904), c. 7, pp. 101–2, 122, 210.] According to Fanti law there can be no division of such "family" property. The result of the decision of the Native Tribunal would therefore be to deprive the appellants of property of which, according to Fanti law, they are the only proprietors.

On the question of res judicata in relation to the award, reference was made to *Doleman & Sons* v. *Ossett Corporation.* (4) When an award has been given the original rights of the parties disappear, and are then as stated by the award.

The Provincial Commissioner's Court had jurisdiction to entertain the appellants' appeal against the judgment of the Native Tribunal: the Provincial Commissioner is ex officio a District Commissioner, and therefore had jurisdiction to hear the appeal: Commissioners Ordinance, 1928, c. 23, s. 29.

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(1) (1867) L. R. 2 H. L. 239, 262.
(2) [1897] 1 Q. B. 165.
(3) (1933) 1 W. A. C. A. 323.
(4) [1912] 3 K. B. 264, 272.

On the finality of a judgment of an inferior court where jurisdiction is involved, see *Mayor, etc., of London* v. *Cox*. (1)

Lastly, for the purposes of the control of the estate it is submitted that Araba Tanuah is not the head of the family, and that is substantially the only point in the second appeal. She had no right of action. According to Fanti law the appellants are the only parties entitled to succeed to the estate. Araba Tanuah had therefore no right to any part of the self-acquired property, and ought never to have been joined as a plaintiff.

Hon. Charles Romer K.C. and *Alan S. Orr* for the respondents. The questions are whether the Provincial Commissioner's Court had jurisdiction to entertain the appeal from the decision of the Native Tribunal; whether or not the Native Tribunal had jurisdiction to entertain Adum's suit; and whether its decision was right or wrong. Whether the appeal from the decision of the Native Tribunal was taken to the proper Court depends on the construction of head (*f*) of sub-s. 2 of s. 43 of the Native Administration Ordinance, and ss. 74 and 75 of that Ordinance. It is submitted that the action comes exclusively within s. 43, sub-s. 2 (*f*), of the Ordinance, and did not come under head (*c*) of that sub-section at all; it was a suit or matter "relating to the succession to the property of any deceased native who had at the time of his "death a fixed place of abode within the State." In effect, it was an administration action, and it did not depend in the least on whether the estate consisted of real or personal estate. It was a claim relating to the succession to the property of Thomas Hagan, and as such was qualified, and qualified alone, by the first part of s. 43 of the Native Administration Ordinance and by the limitations imposed in head (*f*) of sub-s. 2 of s. 43. None of the other sub-heads of sub-s. 2 of s. 43 need therefore be considered at all. Sects. 74 and 75 of the Ordinance must then be looked at to ascertain the proper Court of Appeal from the decision of the Native Tribunal. Sect. 75 has a direct relation to head (*c*) of sub-s. 2 of s. 43. An appeal in respect of matters dealt with in head (*f*) must, under s. 74, go, not to the Court of the Provincial Commissioner, but to the District Commissioner's Court. If that be right, then the appeal in the first suit went to the wrong court. The first appeal therefore fails by reason of the fact that the appellants never went to the only court which had jurisdiction to entertain the appeal from the decision of the Native Tribunal.

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(1) (1867) L. R. 2 H. L. 239, 262.

It would also follow from that that the appeal in the second case must fail too, because Araba Tanuah held a decision in her favour from the Native Tribunal giving her control of three-quarters of the estate. That decision has never been reversed, and therefore still stands. If that be so, she is entitled as a matter of right to ask for an account. So far as Araba Tanuah's right as head of the family to the control of the personal estate of the deceased is concerned, that was established in the first action and must be treated as res judicata in the second.

On the question of the Native Tribunal's jurisdiction to deal with the matter at all, that was decided on the motion to transfer the suit from the Native Tribunal to the Court of the Provincial Commissioner, and was decided against the appellants by the Commissioner of the Central Province, and there has been no appeal from that decision.

Roger Pezzani replied.

1939. July 7. The judgment of their Lordships was delivered by LORD THANKERTON. These are two appeals, consolidated by order of the Board, against two judgments of the West African Court of Appeal, dated respectively December 19 and 21, 1935, in two suits relating to the estate of the late Thomas Hagan, a native, who died at Winneba, in the Central Province of the Gold Coast Colony, on July 9, 1931.

The appellants are the brothers and sister of the deceased, and they were granted letters of administration of his personal estate by the Divisional Court of the said Province on February 22, 1932. The respondents Effuah Adum and her children claim to be interested in the estate, both real and personal, as the domestic "slave-wife" and children of the deceased. The respondent Araba Tanuah claims to be interested in the estate as the head of the family of the deceased. It is common ground that the succession to the estate falls to be determined according to the native customary law.

The first suit, which may be referred to as suit A, was initiated by the issue of a summons in the Native Tribunal of Winneba, on November 21, 1933, by the respondent Adum, on behalf of herself and her children, calling on the present appellants to declare the value of the estate of the deceased, and to show cause why her share, and that of her children, in the estate should not be designated.

On November 28, 1933, the appellants applied to the Court of the Provincial Commissioner of the Central Province for the transfer of the above suit to the Divisional Court on the ground that the Native Tribunal had no jurisdiction to try it, and the Native Tribunal thereupon suspended the hearing of the suit. On February 2, 1934, the Court of the Provincial Commissioner dismissed the application, finding as a fact that the deceased had lived and died at Winneba, and holding that the Native Tribunal had jurisdiction. The appellants appealed therefrom to the Divisional Court of the Province, but they withdrew the appeal by leave of the Court on October 27, 1934, with a view to reaching an amicable settlement.

On December 21, 1934, hearing notices in suit A were issued, and on January 3, 1935, the Tribunal granted an ex parte motion by the respondent Araba, as head of the family of the deceased, to be joined as co-plaintiff in the suit.

On January 8, 1935, the hearing before the Native Tribunal, which had been suspended, was resumed. The appellants again objected to the jurisdiction of the Tribunal, but this objection was over-ruled by the Tribunal, in view of the decision of the Provincial Commissioner's Court on the motion for transfer. The appellants thereafter refused to cross-examine or give any statement before the Tribunal, and, after hearing evidence, the Native Tribunal held that the value of the personal estate had been proved to be about 15,000*l.*, and gave judgment in favour of the respondent Adum and her children for one-fourth of the 15,000*l.*, which was 3750*l.*, plus one-fourth of the immovable properties, and the remaining three-fourths of the amount of the personal estate and the immovable properties were to be under the control of the respondent Araba Tanuah, the head of the deceased Thomas Hagan's family.

The appellants appealed to the Court of the Provincial Commissioner, but, at the hearing of the appeal on July 12, 1935, the Court sustained an objection by the respondents that the appeal was not competent in that Court, and dismissed the appeal. On an appeal, this decision was affirmed by the West African Court of Appeal on December 19, 1935. This judgment is the first of the two judgments against which this appeal is taken.

Turning now to the second suit, which may be called suit B, the writ of summons was issued in the Divisional Court of the Central Province on February 6, 1935, by the respondent Araba Tanuah against the appellants, claiming as head of the family for herself and on behalf of other members of the family, of which she stated the appellants were members, that account should be taken of all the personal estate of the deceased which had come into the possession of, and under the control of, the appellants prior to and since the grant of letters of administration by the Court to the appellants, and for an administration order to be made in regard to the estate. By judgment, dated March 25, 1935, the Divisional Court (Strother-Stewart J.) gave judgment for the present appellants. The learned judge was satisfied that the respondent Araba Tanuah was head of the family, to which the appellants belong, but he held that she had not established such an interest as would entitle her to call the appellants to account, as it had not been proved that she or the members of the family, other than the appellants, were entitled to any portion of it. The learned judge disregarded the decision of the Native Tribunal in suit A, although it had been submitted to him that that judgment constituted res judicata. On an appeal by the respondent Araba Tanuah, the West African Court of Appeal, on December 21, 1935, set aside the judgment of the Divisional Court, and granted the respondent the relief claimed by her.

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This judgment is the second judgment here appealed against. The Court of Appeal agreed with the finding of the Divisional Court that the said respondent was head of the family, but they held that the question whether the property was self-acquired, or whether the respondent had any interest in it, was decided by the Native Tribunal in the respondent's favour, and was binding.

In the first place, an attempt by the appellants to found on an alleged arbitration award, prior in date to the decision of the Native Tribunal, may be disposed of. It is perhaps enough to say that the contention that there was a binding, award, which precluded the respondent Adum from suing on anything but the award, appeared for the first time in the body of the appellants' case in this appeal, but it does not appear among the reasons of appeal. Further, although some of the arbitrators gave evidence as to it at the hearing before the Native Tribunal, its date is not proved, and the evidence was quite insufficient to prove that the award was accepted as final and binding by the parties. It is not surprising, therefore, to find the present appellants' pleader, at the hearing before the Divisional Court on February 20, 1935, maintaining that the arbitration did not eventuate into an award. Their Lordships, in these circumstances, are not prepared to entertain, at this late stage, such a contention, as they are not satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the new plea: *Connecticut Fire Insurance Co.* v. *Kavanagh.* (1)

The appellants' main contentions challenge the jurisdiction of the Native Tribunal over the subject-matter of suit A. It will be noted that suit A relates to the whole estate of the deceased, both real and personal, while suit B relates only to the personal estate, but the judgment against the appellants in suit B assumes the validity of the judgment of the Native Tribunal. The jurisdiction of a Paramount Chief's Tribunal at the material date was conferred by s. 43 of the Native Administration Ordinance, c. 111, 1928, which provided as follows:—

(1) [1892] A. C. 473, 480.

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"43.—(1.) A Paramount Chief's Tribunal shall have and "may exercise within the State of such Paramount Chief civil "jurisdiction for the hearing and determination of the causes "and matters hereinafter mentioned in which all parties are "natives and the defendant was at the time when the cause of "action arose within such State, or in which any party not "being a native consents in writing to his case being tried by "such Paramount Chief's Tribunal.

"Provided always that a Paramount Chief's Tribunal shall "not, unless the parties shall agree thereto, have any jurisdiction in any cause or matter where it appears either from "express contract or from the nature of the transactions out "of which such cause or matter shall have arisen that the "parties expressly or by implication agreed that their obligations in connection with such transactions should be regulated "substantially according to the provisions of some law or laws "other than native customary law, or where otherwise some "other such law or laws as aforesaid is or are properly applicable thereto.

"(2.) The causes and matters hereinabove in this section "referred to are the following :—

"(*a*) Suits to establish the paternity of children, other "than suits in which some question affecting rights arising "out of any Christian marriage is or may be involved ;

"(*b*) Suits relating to the custody of children, other than "suits in which some question affecting rights arising out of "any Christian marriage is or may be involved ;

"(*c*) Suits relating to the ownership, possession, or occupation of lands situated within the State of such Paramount "Chief ;

"(*d*) Suits for divorce and other matrimonial causes "between natives married under native customary law ;

"(*e*) Personal suits in which the debt, damage, or demand "does not exceed one hundred pounds ;

"(*f*) Suits and matters relating to the succession to the "property of any deceased native who had at the time of his "death a fixed place of abode within the State ; and

"(*g*) Any other causes and matters by this ordinance "expressly assigned to a Paramount Chief's Tribunal or to a "Divisional Chief's Tribunal."

In the first place, the appellants maintained that it had not been established that the appellants were "at the time when "the cause of action arose within such State." But this question of fact was decided against the appellants on their motion for transfer of suit A by the judgment of the Provincial Commissioner's Court, dated February 2, 1934, the appeal against which was withdrawn by the appellants, and their Lordships are not prepared to entertain this contention now.

In the second place, the appellants submitted that the letters of administration having been granted by the Divisional Court of the Province, suit A should have been instituted in that Court, which, if it had so desired, could have referred any question relating to native customary law to a Native Tribunal under s. 59, sub-s. 1, of the Ordinance. They further suggested that, by her part in suggesting that the appellants should be the parties to apply for the letters of administration, the respondent Araba Tanuah had elected to proceed in that Court; and, lastly, that a writ to have the estate valued and a share declared was not within the head (*f*) of s. 43, sub-s. 2. These points really all turn on the proper construction of head (*f*). Counsel for the appellants submitted that this head only included suits as to the right to succeed, and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships see no reason for such a narrow construction of the words "suits and matters relating to the succession to the property," as, in their opinion, distribution of the estate naturally comes within the meaning of these words, and valuation of the estate is necessarily incidental to ascertainment of the shares for the purpose of distribution. They agree with the view expressed by both the Courts in suit A that that suit is a suit relating to the succession to the property of the deceased within the meaning of head (*f*) of s. 43, sub-s. 2. If this be so, there can be no reason why letters of administration should not be obtained in one court, and proceedings relating to the distribution of the estate should be dealt with by another court. There can be no reason for rendering nugatory the jurisdiction conferred by head (*f*), and none of the Courts below have felt any practical difficulty in the matter. Accordingly the application for letters of administration in the Divisional Court cannot preclude any party from instituting proceedings relative to distribution before the Native Tribunal.

The appellants maintained, thirdly, that suit A was a personal suit for more than 100*l.*, and that the jurisdiction of the Native Tribunal was excluded by the terms of head (*e*) of s. 43, sub-s. 2, and, fourthly, it being admitted that two houses which formed part of the succession were not situated within the State, that jurisdiction was excluded by the terms of head (*c*) of s. 43, sub-s. 2. Both these contentions are based on a construction of s. 43, sub-s. 2, which their Lordships do not accept. In their opinion, while each of the heads (*a*) to (*g*) is subject to the provisions of sub-s. 1 of s. 43, each head in sub-s. 2 affords a self-contained subject of jurisdiction, which is independent of the other heads, and it is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads. From this it follows that as suit A falls within head (*f*), and satisfies the provisions of sub-s. 1, heads (*c*) and (*e*) of sub-s. 2 are irrelevant on the question of jurisdiction. Both Courts below took the same view.

Their Lordships are therefore of opinion that the Native Tribunal had jurisdiction to deal with suit A.

Lastly the appellants sought to have the judgment of the Native Tribunal reviewed on the merits by this Board, but their Lordships agree with the West African Court of Appeal that the judgment of the Native Tribunal is now final and binding on the appellants. That judgment was given on January 8, 1935, and the appellants appealed to the Court of the Provincial Commissoner, leave to appeal being granted on May 4, 1935. That appeal was dismissed on the ground that suit A was a suit relating to the succession of property, in regard to which the only right of appeal lay to the Court of the District Commissioner under s. 74 of the Ordinance, and was not a suit or matter relating to the ownership, possession or occupation of any lands, an appeal in which would lie to the Court of the Provincial Commissioner under s. 75 of the Ordinance. As already pointed out, this judgment, the reasons for which are in conformity with the views expressed by their Lordships, is final and binding on the appellants. Under s. 76 of the Ordinance, no appeal lies under s. 74 unless notice of appeal is given within four months from the date of a decision by a Paramount Chief's Tribunal. The appellants did not give notice of an appeal under s. 74 within the period so prescribed, and the fact that under s. 29 of the Commissioners Ordinance, c. 23, 1928, every Provincial Commissioner is ex officio a District Commissioner, cannot avail to remedy this omission on the part of the appellants. The judgment of the Native Tribunal is therefore final and binding on the appellants, and it follows that the Court of Appeal were right in setting aside the judgment of the Divisional Court in suit B, and in holding that the respondent Araba Tanuah had sufficient interest to entitle her to an accounting by the appellants and in granting her the relief claimed by her.

The appeal, accordingly, fails as regards both suits, and their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the judgments appealed against should be affirmed. The appellants will pay to the respondents their costs in the appeal.

Solicitors for appellants: *A. L. Bryden & Co.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.* 1939 Oct. 12.

FRANCIS DAY AND HUNTER, LIMITED APPELLANTS;

AND

TWENTIETH CENTURY FOX CORPORATION, LIMITED, AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

Canada (Ontario)—Copyright—Song—Title used as motion picture title—Neither music nor words of song reproduced in film—No infringement of copyright in song by performance in public—Literary copyright—" passing off "—Copyright Act, 1842 (5 & 6 *Vict. c.* 45) *—Copyright (Musical Compositions) Act,* 1882 (45 & 46 *Vict. c.* 40) *—Canadian Copyright Act,* 1921 (*now R. S. C.,* 1927, *c.* 32), *as amended by the Canadian Copyright Amendment Act,* 1931 (21 & 22 *Geo.* 5, *c.* 8), *s.* 2 (*v.*); *s.* 3.

The appellants, part owners of the copyright, acquired under the Copyright Act, 1842, in a song, consisting of words and music, entitled " The Man Who Broke the Bank at Monte Carlo," claimed damages from the respondents for infringement of their copyright in the song by performance in public in Canada of a motion picture entitled " The Man Who Broke the Bank at " Monte Carlo," of which the first respondents were the distributors, and the second respondents the exhibitors at cinematograph theatres owned by them. The scope of the action became extended without formal amendment, but without objection, so as to include also a claim for infringement of the literary copyright and for " passing off." Apart from the fact that the title of the song and of the motion picture were the same, no part of the actual words or music of the song were used in the film:—

Held, first, that the appellants and their predecessors in title having failed to comply with the condition, imposed by the Copyright (Musical Compositions) Act, 1882, which qualified the Act of 1842, and which, by necessary implication applied to Canada, that if the proprietor of the copyright desired to acquire the right of public performance there must be printed upon the title page of each published copy a notice to the effect that the right of public performance was reserved, their claim for infringement of performing right failed.

Further, the claim also failed on the facts, inasmuch as the mere throwing of the title of the song on the film at the outset could not be held to be a public performance of a musical composition.

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD ROMER, and SIR LYMAN POORE DUFF (Chief Justice of Canada).

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Held, secondly, that, even assuming that the appellants were entitled to the literary copyright in Canada which they claimed, the use in the motion picture of the words of which the title of the song consisted was on the facts of this case, and particularly when used in so different a connection, too unsubstantial a matter to constitute an infringement of the appellants' literary copyright.

Dicks v. *Yates* (1881) 18 Ch. D. 76 referred to.

Held, further, that the definition inserted by amendment in 1931 into s. 2 of the Canadian Copyright Act, 1921, that " (v.) "' work ' shall include the title thereof when such title is original "and distinctive," did not mean that the title of a work was to be deemed to be a separate and independent " work," and when that definition was read with s. 3 of the Act of 1921, which defined copyright as " the right to produce or reproduce the work " or any substantial part thereof," the result was that to copy the title constituted infringement only when what was copied was a substantial part of the work. The new definition (v.) did not entitle the appellants to succeed.

Held, lastly, that the respondents had not been " passing off " the exhibition of their motion picture as a performance of the song. The thing said to be passed off must resemble the thing for which it is passed off, and the song and the motion picture were completely different and incapable of comparison in any reasonable sense.

Order of the Court of Appeal for Ontario [1938] 3 D. L. R. 375 affirmed.

APPEAL (No. 94 of 1938) from an order of the Court of Appeal for Ontario (June 13, 1938), reversing a decision of McEvoy J. (November 23, 1937).

The appellants, Francis Day & Hunter, Ld., music publishers, were the owners of a share of the copyright in the musical work consisting of the words and music of a song entitled " The Man Who Broke the Bank at Monte Carlo," which was registered at Stationers' Hall, in London, and acquired copyright under the Copyright Act of 1842. The first respondents, Twentieth Century Fox Corporation, Ld., were distributors and renters of films in Canada, and the second respondents, Famous Players Canadian Corporation, Ld., were the owners of cinematograph theatres in Canada. Over a period from December, 1935, the first respondents rented positive copies of a motion picture entitled " The "Man Who Broke the Bank at Monte Carlo," to exhibitors in Canada, and the second respondents exhibited the motion

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picture on dates over the same period at theatres owned or operated directly or indirectly by them. In 1936 the appellants brought an action against both respondents, claiming damages for infringement of their copyright in the song by performance in public. Without any formal amendment the scope of the action became extended, without objection, so as eventually to include also a claim for infringement of the literary copyright, and also for "passing off." It was admitted by the appellants at the trial that, apart from the use of the words "The Man Who Broke the Bank at Monte Carlo" as the title of the film, neither the music nor the words of the musical work were advertised or reproduced in the film by the respondents.

The facts, and the relevant statutory provisions, appear from the judgment of the Judicial Committee.

The trial judge (McEvoy J.) decided against the appellants in respect of the performing right, but decided in their favour and awarded $1046.35 damages in respect of their half-interest in the copyright for the use of the "title and theme" of the musical work.

On appeal by the present respondents, the Court of Appeal for Ontario (Middleton, Masten and Henderson JJ.A.) agreed with McEvoy J. in rejecting the claim so far as regards the performing right, but reversed his decision in respect of the literary copyright, and held that there had been no infringement; the Court also rejected the claim for "passing off." The appeal is reported at [1938] 3 D. L. R. 375.

1939. July 17, 18. *K. E. Shelley K.C.* and *P. Stuart Bevan* for the appellants. The appellants must establish, first, that immediately before January 1, 1924—when the Canadian Copyright Act, 1921, came into force—there was copyright in Canada in the musical work in question as a whole, including the performing right, and, secondly, that such copyright had substituted for it by the Canadian Copyright Act of 1921 copyright under that Act of 1921. The material statutes relating to copyright which were in force in Canada immediately before the coming into force of the Canadian Act

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of 1921 were the Imperial Copyright Act of 1842, and the Canadian Copyright Act, 1906. It is submitted that by reason of the fact that the appellants had got copyright in Canada under the Imperial Act of 1842, they had therefore got substituted copyright by reason of s. 42 of the Canadian Act of 1921. The contention of the respondents, however, was that in order to get substituted copyright under the Canadian Act of 1921 the appellants must previously have had copyright in Canada by virtue of Dominion legislation, namely, under the Canadian Copyright Act of 1906, under which the appellants had admittedly no rights because it was a condition of obtaining copyright under the Act of 1906 that they should print and publish and register in Canada, none of which things had been done. The respondents say that in *Mansell* v. *Star Printing and Publishing Co. of Toronto* (1) this Board decided this point in favour of their contention, and that the Court of Appeal in the present case have so held. *Mansell's* case (1) is distinguishable, however, because it was a case about pictures—artistic copyright ; the Imperial Act of 1842 does not give any copyright in pictures, and therefore there were no rights in Canada in respect of pictures immediately before January 1, 1924, and if, therefore, there is to be found substituted copyright in pictures in Canada it must be found in the Canadian Act of 1906, which did include pictures, or not at all.

Even if the appellants have not got the performing right they are still entitled to succeed if they have got copyright. Prima facie, the Copyright Act, 1842, gives performing right. It is said against the appellants, however, that they have no performing right in this case because of their failure to comply with the provisions of s. 1 of the Imperial Act of 1882, which requires the proprietor of the copyright, if he desires to acquire and retain the right of public representation or performance, to print upon the title page of every published copy a notice to the effect that the right of public representation or performance is reserved. It is contended that that Act did not extend to the Dominions. An Act passed by the

(1) [1937] A. C. 872.

Parliament at Westminster is prima facie one which applies to the United Kingdom only, and not to the Dominions: *Routledge* v. *Low* (1); *Graves & Co., Ld.* v. *Gorrie.* (2) Unless express provisions are found in an Act it must not be assumed that the Act applies to Canada: *Canadian Performing Right Society, Ld.* v. *Famous Players Canadian Corporation, Ld.* (3) It is submitted that the Imperial Copyright Act of 1882 was not in force in Canada. Because the work in question fell within the provisions of the Imperial Act of 1842, which continued to apply to Canada immediately before January 1, 1924, there was copyright in Canada, and full copyright, because the Act of 1882 did not apply to Canada; then, by reason of s. 42 of the Canadian Copyright Act of 1921 that copyright was converted into copyright under the Canadian Act, and the appellants are entitled to the benefit of the substituted copyright. The fundamental question of great importance not only to the appellants but to other copyright owners is whether *Mansell's* case (4) decides that substituted copyright can only be obtained under the Act of 1921 if the owner has got copyright in Canada by virtue of Dominion legislation. In the Canadian Act of 1921 itself one of the rights for which a corresponding right is to be substituted is performing right; it is also apparent that it is possible to apply the Imperial Act of 1882, assuming it applies to Canada, and therefore there must have been before January 1, 1924, in Canada some performing right in the view of the Legislature, and that performing right can only come from the Imperial Act of 1842. If the appellants' rights under the Act of 1842 are qualified by the Canadian Act of 1906 then admittedly *Mansell's* case (4) must apply.

On the question whether the use by the respondents of the title of the work constitutes a sufficiently substantial infringement of the appellants' copyright or performing right as to enable them to succeed, it is obvious that every time the film was shown there was thrown upon the screen the words "The Man Who Broke the Bank at Monte Carlo," and therefore on each such occasion there was an invasion not merely of the appellants' performing right, but of their graphic right. With regard to the Canadian Copyright Amendment Act, 1931, it is submitted that the new para. (v.) added by that Act to s. 2 of the Act of 1921, and which provides that "'work' shall include the title thereof when such title is "original and distinctive," applies to all copyright works in existence as from the date of that amendment—1931. The contention of the respondents is that para. (v.) only applies to new works coming into existence after 1931. It would be quite possible to argue that there was an infringement of the copyright by taking the words of the title because that was a substantial part of the work: Copinger on the Law of Copyright, 7th ed., p. 54. The title must be a part of the literary work. By the addition of para. (v.) in 1931 the Legislature must have intended to give some protection to a title as such, otherwise the paragraph would be of no effect. A title of a work, when it is original and distinctive, may for the purpose of the sole right and the question of infringement, be regarded as a work. "The Man Who Broke "the Bank at Monte Carlo" is an original and distinctive title, and the Legislature has enacted that that original and distinctive title can be regarded for the purpose of the sole right that has been given to the owner of the copyright as a separate work in the sense that the two things may be considered separately. The appellants' song consists of three parts—title, words and music. Admittedly the respondents have only taken one of them, but it comes down to a question of fact whether the taking of one of these parts, namely, the title, is or is not a taking of a substantial part, and it is submitted that the finding of the trial judge was that it was, and that the evidence points entirely that way. If that is right, the appellants are entitled to succeed. The Court of Appeal below were of opinion that the title in one kind of work could not be infringed by its use for another kind of work; it is submitted that there can be no such general principle; it is a matter which must be decided on the particular circumstances of each case.

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(1) (1868) L. R. 3 H. L. 100, 110, 113.
(2) [1903] A. C. 496, 498.
(3) (1927) 60 O. L. R. 280.
(4) [1937] A. C. 872.

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P. Stuart Bevan followed, and on the general principles of "passing off" referred to *A. G. Spalding & Bros.* v. *A. W. Gamage, Ld.* (1), and *Samuelson* v. *Producers' Distributing Co.* (2)

A. J. Thomson K.C. and *E. J. Macgillivray K.C.* for the respondents were not called upon to argue.

Oct. 12. The judgment of their Lordships was delivered by LORD WRIGHT. In 1892 a song entitled "The Man Who "Broke the Bank at Monte Carlo" was published in London. It consisted of three verses, with a chorus, and was written and composed by Fred Gilbert. Many people remember the original publication. Both words and music were of the most common-place character, but the music went with a jaunty swing which gave it great vogue and popularity, especially when performed by Charles Coborn. The song, consisting of words and music, was duly registered at Stationers' Hall, in London, and acquired copyright under the Copyright Act of 1842. But the performing right was not acquired, because of the failure to comply with the conditions imposed by the English Copyright (Musical Compositions) Act, 1882, which required that the proprietor of the copyright, if he desired to acquire and retain the right of public representation or performance, should print upon the title page of every published copy a notice to the effect that the right of public representation or performance was reserved.

In the song the singer recounts how he went to Monte Carlo to raise his winter's rent, but was so successful at the tables that he had lots of money, went to Paris, and swaggered about as a millionaire. The words of the title are repeated at the end of the chorus.

Gilbert, the writer and composer, died intestate in 1903. Under the then existing law in England the copyright would have expired in 1934, but under the Copyright Act, 1911, the period was changed into one of fifty years from the author's death, that is, until 1953. For the residue of this extended period, that is, from 1934 to 1953, the copyright vested not in the assignees of the right but in the author or his personal representatives. In the present case these were two daughters. One of these, in 1935, transferred one half of her right to the appellant company, whose title, so far as it goes, is not questioned in these proceedings.

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(1) (1915) 32 R. P. C. 273, 283. (2) [1932] 1 Ch. 201, 206.

Sometime about 1935 there was exhibited in various theatres in Canada a motion picture entitled "The Man Who "Broke the Bank at Monte Carlo." The plot of that picture was based on a comedy in three acts, by Ilia Surgutchoff and F. A. Swann, entitled "The Gamble," but also at different times called "The Man Who Broke the Bank at Monte Carlo," "Le Jeu," and by other titles. The motion picture represented the plot of the comedy, which consisted of the story of an exiled Russian Prince, working as a taxi driver in Paris, who went to Monte Carlo to try his luck with money subscribed by his compatriots in Paris. He had a wonderful run of luck. Then followed an elaborate story of his love affair with a woman. He went back to Monte Carlo, was unsuccessful and lost all his money. He suspected that the object of his affection was guilty of double dealing. He returned to Paris and to his taxi cab. Eventually he and the girl settled their difficulties and all ended happily.

To an unprejudiced observer no two things could appear more dissimilar than this song and this elaborate motion picture, except for the bare fact that each bears the title "The Man Who Broke the Bank at Monte Carlo." The appellants, however, in 1936, brought an action against the two respondents, the former of whom had distributed and rented the film in Canada, while the latter had exhibited it in its cinematograph theatres in Canada. The claim in the action was for damages for infringement of the appellants' copyright in the song by performance in public. But without any formal amendment the scope of the action became extended, without objection, so as eventually to include also a claim for infringement of the literary copyright and for "passing of."

In the Supreme Court of Ontario, McEvoy J., who tried the action, decided against the appellants in respect of the performing right, but decided in their favour and awarded damages for the use of the "title and theme" of the musical work. He said nothing on the issue of "passing off." In the Appellate Division, the Court of Appeal agreed with McEvoy J. in rejecting the claim so far as regards the performing right, but reversed his decision in respect of the literary copyright, and held that there had been no infringement. The Court also rejected the claim for "passing off." It will be necessary in this appeal to discuss the three heads of claim independently.

The claim for infringement of the appellants' performing right in the song fails, in their Lordships' opinion, on grounds both of law and of fact. As to the law, the appellants' claim was expressly based on the Imperial Act of 1842, which gave to the owner of copyright under that Act a right to protection in Canada. But it was contended on behalf of the respondents that, apart from difficulties arising from the course of Canadian copyright legislation, which need not here be discussed, the appellants, whose claim in the action was based solely on the Act of 1842, could not in any event claim the protection of that Act because, as has been stated above, they and their predecessors in title had failed to publish on each copy of the song the printed notice required by the Copyright (Musical Compositions) Act, 1882. Now it is true that the Act of 1882 did not in terms extend to Canada, but in their Lordships' judgment it did so by necessary implication and effect. It was in the nature of an amendment to the Act of 1842, and had the effect of regulating the rights under that Act in respect of public performance. It imposed a new condition for the acquisition and retention of the performing right, whether in England or in any other place where the copyright was based upon, and derivative from, the English right. Thus the Act of 1842 cannot be relied on where performing right is in question according to its original bare terms, but only as qualified by the Act of 1882.

On this narrow ground of law, apart from other considerations, the appellants must, in their Lordships' opinion, fail. This agrees with the decision of McEvoy J. and the Court of Appeal. But in truth the appellants' claim fails on the facts. There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. But it is idle to suggest here that by anything the respondents have done they have performed the song in any sense. The motion picture is, it is true, what is called a talkie film. But not a word of the song is repeated in any form except that the title is thrown on the film at the outset. It will be considered later if that constituted an infringement of the literary copyright in the film. But to say that this bare fact was a public performance of a musical composition is abhorrent to common sense. A musical composition is performed by audible reproduction, by the voice or by musical instruments, or by mechanical methods of reproduction. Nothing of the sort can be predicated here.

The claim for infringement of the literary copyright fails equally, but for other reasons. It is not claimed that there has been any copying of the letterpress or musical notation, except the words " The Man Who Broke the Bank at Monte "Carlo," which constituted the title of the song, and appear as the title of the film. What is relied on as infringement is the use of these words as the title of the film. It is clear that they have been used by the respondents as the title of the film, both in the actual production and in the advertisements issued on behalf of the respondents The respondents, however, say that the use of these words is too unsubstantial a matter to constitute an infringement of copyright, and that there is no copyright in a title. They also rely on the recent decision of this Board in *Mansell* v. *Star Printing and Publishing Co. of Toronto*. (1) That decision was by itself held fatal to the appellants' claim by the Court of Appeal. That Court held that the effect of the decision was that under the Canadian Copyright Act, 1921, which came into force in 1924, all rights of copyright existing in Canada in virtue of Imperial legislation might be converted into rights existing by virtue of Dominion legislation, but only by complying with the conditions under the Act of 1906, which was not done either in *Mansell's* case (1) or in the present case. In the words of Middleton J. A. :

(1) [1937] A. C. 872.

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"It was Canadian rights alone that were preserved. All "inchoate rights existing by virtue of Imperial legislation "came to an end." (1) But counsel on behalf of the appellants sought to distinguish the decision in *Mansell's* case (2), and contended that it did not apply in the present case. In *Mansell's* case (2), it was contended, what was in question was copyright in pictures, to which no copyright attached under the Act of 1842. It was first granted in England under the Fine Arts Copyright Act of 1862, but that Act did not apply to Canada. There could therefore be no copyright in such works in Canada under that Act. There was no copyright in such works until the passing of the Canadian Copyright Act of 1906, and then only subject to the conditions imposed in that Act, which had not been complied with. In the present case, however, as the appellants contended, their only claim to copyright was based on the English Act of 1842, the rights under which did not depend on the performance of conditions under any Canadian Act; that copyright, it was said, subsisted at the date specified as the date of the commencement of the Act of 1921, and by the terms of the Canadian Act of 1921 rights under that Act took the place of the rights under the English Act of 1842, so that at the material dates these latter rights were vested in the appellants in the circumstances stated above. In this way, it was said, the appellants did not rely on, and did not need to rely on, any Dominion copyright legislation, except in so far as the Act of 1921 gave a substituted copyright for the right existing under the Act of 1842.

Their Lordships do not think it necessary in the present appeal to determine this controversy, which raises questions of difficulty and importance on the law, because the appeal can, in their opinion, be decided on another ground. Assuming, but not deciding, that the appellant company is entitled to the copyright in Canada which it claims, it is, in their Lordships' judgment, not entitled to succeed in its claim that the respondents have infringed that right. The copying which is complained of is the use of the title, and that is too

(1) [1938] 3 D. L. R. 377.

(2) [1937] A. C. 872.

unsubstantial in the facts of this case to constitute an infringement. The appellants' contention was put as high as that copyright in a title is infringed by the application of that title to a work of a different character from that of the work to which it was originally applied. In the present case the title was originally applied to a musical composition, whereas it has been applied by the respondents to a motion picture or a film. The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning it would be said that the title " Adam " applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. As Jessel M.R. said in *Dicks* v. *Yates* (1) (which, as Lindley L.J. said in *Licensed Victuallers' Newspaper Co.* v. *Bingham* (2), virtually overruled on this point *Weldon* v. *Dicks* (3)) there might be copyright in a title "as, for instance, in a whole "page of title or something of that kind requiring invention." But this could not be said of the facts in the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To " break the bank " is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an

(1) (1881) 18 Ch. D. 76, 89.
(2) (1888) 38 Ch. D. 139.
(3) (1878) 10 Ch. D. 247.

infringement, especially when used in so different a connection.

The appellants' counsel, however, have strenuously contended that though this might be the position under English or Canadian law before 1931, it was changed in Canada by an amendment in that year of the Canadian Act of 1921, which added a new definition to those contained in s. 2 of the latter Act—namely, " (v.) 'work' shall include the title thereof "when such title is original and distinctive." It was in virtue of this definition that McEvoy J. held that there was infringement, and he awarded damages to the appellant company. The Court of Appeal reversed that holding. Middleton J.A. did not think it necessary to decide whether the amendment applied to existing copyrights. "It is "admitted," he said, "that prior to this Act no such right "existed." He did not think that for purposes of this case the Act of 1931 had changed the law.

Their Lordships are prepared to assume for purposes of this appeal that the amendment applied to existing copyrights; they will likewise assume that the title was original in the sense that it had not been copied from another work. They are content for purposes of this appeal to adopt the definition given by Maclean J. in *Kantel* v. *Frank Grant, Nisbet & Auld, Ld.* (1), though they wish to reserve the question how far that definition can be accepted as sufficient in other cases. It is, however, difficult to define satisfactorily the word "distinctive," since it cannot mean merely that the title is used to identify the particular work. In this connection regard must be had to s. 3 of the Act of 1921, which defines copyright as the "right to produce or reproduce the work "or any substantial part thereof." The definition (v.) does not, in their Lordships' judgment, mean that the title of a work is to be deemed to be a separate and independent "work." Work is to include "the title thereof," that is to say, the title is to be treated as part of the work, provided that it is original and distinctive, whatever these words may connote. When that definition is read with s. 3, the result is that to copy the title constitutes infringement only when

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(1) [1933] Ex. C. R. (Can.) 84.

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what is copied is a substantial part of the work. This view would agree in effect with what was said by Jessel M.R. in *Dicks* v. *Yates* (1) in the words quoted above, and would apply to a case such as a title covering a whole page of original matter, or something of that nature, but would not justify such a wide extension of copyright as the appellant company has contended for, or the holding of McEvoy J. on this point. It is said that so to construe the definition is to treat it as adding nothing to the law. But the definition may have been inserted to settle doubts, and to avoid it being said that in no circumstances could a title receive protection. In any event, their Lordships do not think that the new definition (v.) entitles the appellants to succeed in this case.

There remains a third point which has been argued on behalf of the appellants—namely, that the respondents have been "passing off" the exhibition of their motion picture as a performance of the song. This startling claim was not pleaded, and is dealt with only by the Court of Appeal, who disposed of it in summary fashion. "Certainly the moving "picture was not represented as the copyright song. No one "could be misled or defrauded by what was here done." (2) In these words Middleton J.A. dismissed the claim.

Their Lordships do not wish to be taken to say that in no circumstances can there be a "passing off" by the use of the same title for a literary, artistic or musical work, though it is difficult to imagine such a case where there are no circumstances, other than the mere title, calculated to mislead. A title may, however, be used in the case of a book or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of case. It is not impossible that there might be "passing off" of such a nature that persons

(1) 18 Ch. D. 76, 89.

(2) [1938] 3 D. L. R. 378–9.

might pay to go to a performance of the defendant's work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's common law rights and a disturbance of his business interests. But, in their Lordships' opinion, it is enough to state these elementary principles to see how inapplicable they are to the subject-matter of this appeal. The member of the public who is supposed to be likely to be deceived, must, to start with, be assumed to know what he was wanting to see or hear. Thus, in the present case he must be presumed to know that what he wanted was to hear the song "The Man Who Broke the Bank "at Monte Carlo." It seems inconceivable that when, or if, he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle. In Canada, what was advertised was the film. There was no hint that the song was going to be sung. Indeed, it was not sung at any performance. If it had been sung, it would presumably, on the assumptions made by their Lordships, have been an infringement of the performing right, but, if that were possible, it would have made the claim for passing off even more preposterous, because the assumed victim would have got what he desired—namely, a performance of the song.

On all these grounds their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: *Syrett & Sons.*
Solicitors for the respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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1939
Oct. 13.

PIONEER LAUNDRY AND DRY CLEANERS, LIMITED . . . . . APPELLANTS;

AND

MINISTER OF NATIONAL REVENUE . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income tax—Company—Acquisition of second-hand machinery—Formerly property of company now in liquidation—Shareholders of both companies the same—Machinery fully written off by depreciation while in ownership of former company—Claim by acquiring company to depreciation allowance—Discretion of Minister —Income War Tax Act, R. S. C., 1927, *c.* 97, *s.* 5 (*a*).

The appellant company, having acquired certain second-hand machinery and equipment which had formerly belonged to a company, which had gone into voluntary liquidation, of the same name as, and carrying on business similar to, that of the appellant company, claimed in its return for taxation purposes certain allowances for depreciation in respect of the acquired machinery and equipment. The appellant company was in fact controlled by the same shareholders who formerly controlled the company to which the machinery and equipment had originally belonged, and while in the ownership of that company the machinery and equipment in question had been fully written off by depreciation. The Minister of National Revenue having refused the claim of the appellant company on the ground that there had been no actual change in ownership of the assets acquired :—

Held, that under s. 5 (*a*) of the Income War Tax Act, R. S. C., 1927, c. 97, the appellant company was entitled to a deduction in respect of depreciation in " such reasonable amount as the "Minister, in his discretion, may allow," and that the exercise of that discretion involved an administrative duty of a quasi-judicial character, to be exercised on proper legal principles. The decision of the Minister was not a proper exercise of his discretion inasmuch as he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company, and to inquire who its shareholders were and its relation to its predecessors. The taxpayer was the company, and not its shareholders.

The circulars issued by the Minister to local officers of the department stating rates of depreciation are for the general guidance of the officers, and cannot be regarded as the exercise of his statutory discretion by the Minister in any particular case.

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* *Present :* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

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Pioneer Laundry and Dry Cleaners, Ld. v. Minister of National Revenue.

Judgment of the Supreme Court of Canada [1939] S. C. R. (Can.) 1, set aside.

Appeal (No. 35 of 1939) from a judgment of the Supreme Court of Canada (December 12, 1938), affirming a judgment of the Exchequer Court (November 4, 1937).

The appellant company, Pioneer Laundry and Dry Cleaners, Ld., was incorporated on March 23, 1932, and acquired certain second-hand machinery and equipment from a company called the Home Service Co., Ld., at a price fixed by independent appraisal. Home Service Co., Ld., was incorporated also on March 23, 1932, and on April 1, 1932, it acquired all the physical assets of seven companies, including the original Pioneer Laundry and Dry Cleaners, Ld., which had gone into voluntary liquidation on March 30, 1932. The machinery and equipment acquired by the new Pioneer Laundry and Dry Cleaners, Ld., from Home Service Co., Ld., were acquired by the latter company from the original Pioneer Laundry and Dry Cleaners, Ld., and had been fully written off by depreciation while in the ownership of the original Pioneer company. As the result of various transactions affecting the companies concerned, the shareholders of the new and of the original Pioneer Laundry and Dry Cleaners, Ld., were in fact, the same.

The facts appear fully from the judgment of the Judicial Committee.

The appellant company, in its income tax return, filed in July, 1933, in compliance with s. 33 of the Income War Tax Act, R. S. C., 1927, c. 97, for the fiscal year ending March 31, 1933, disclosed gross earnings of $171,122, and claimed various deductions, including allowances for depreciation in respect of the machinery and equipment in question. The decision of the Commissioner of Income Tax disallowing the claim was affirmed by the Minister of National Revenue on the ground that there had been no actual change of ownership of the assets purchased by the appellant company.

An appeal by the appellant company from that decision to the Exchequer Court (Angers J.) was dismissed, and his judgment was affirmed by the Supreme Court of Canada (Crocket, Kerwin and Hudson JJ., Duff C.J. and Davis J. dissenting). The appeal is reported at [1939] S. C. R. (Can.) 1.

1939. July 11, 13. *Martin Griffin K.C.* for the appellants. The respondent Minister contends that the appellant company is not entitled to the depreciation allowance claimed because, it is said, it is the successor of a previous company of the same name which had the same shareholders, and the contention of the Minister is that, being identified with its predecessor so called, the appellant company has lost the right to depreciation allowance because the predecessor company had received its depreciation allowance in full in respect of the machinery and equipment in question. The question may be stated thus: Is a company which purchases second-hand machinery debarred from the right to depreciation allowance on the price actually paid by it for that machinery by the fact that it is controlled by the same shareholders who formerly controlled another company which had previously owned the same machinery, and which had received in full a depreciation allowance on the price at which that machinery was at that time set up in its works? [Reference was made to the Income War Tax Act, R. S. C., 1927, c. 97, ss. 5, 6, 33 and 54.] The words of s. 5 (*a*) are "Such reasonable amount "as the Minister, in his discretion, may allow for depreciation." That is all the statute contains on that matter. The Minister is not confined to the method of allowance indicated in s. 75 of the Act; any method of allowance that he choses to use would be within the powers given him under s. 5. The Minister having decided some years ago on the method of ascertaining depreciation allowance by deducting annually a percentage of cost over a period, the taxpayer thereby becomes entitled to an allowance as of right. It becomes a vested statutory privilege, and the Minister has no power to take it away. The appellants base their argument on the passage in the judgment of Duff C.J. and Davis J., where they say (1): "The appellant was a new owner for all legal purposes and its

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(1) [1939] S. C. R. (Can.) 6.

"predecessor's depreciation allowance is immaterial when "considering what is a reasonable amount to be allowed for "its own depreciation. What is virtually said here against "the appellant is: You are entitled to nothing because the "beneficial ownership of your company is the same as the "beneficial ownership of another company from which, "indirectly, you purchased your machinery and equipment "and we are entitled to look right through your legal existence "and say that you are entitled to nothing at all for depreciation "on your machinery and equipment. In my view that is "not a legitimate exercise of the discretion which Parliament "vested in the Minister."

[Counsel was stopped.]

F. P. Varcoe K.C. and *Frank Gahan* for the respondent, were required to deal only with the question whether the discretion was reasonably exercised by the Minister. The Minister did do what was reasonable in the circumstances of this case. It would appear that the vendor of the machinery was the sole shareholder of the purchasing company; there was substantially no change in the position of the appellant company as compared with the old one to which the machinery had formerly belonged. The shareholders had already been fully protected by means of depreciation allowances while the machinery was in the ownership of the old company. The Minister's discretion is very wide, and the only question is whether he took into consideration everything which he should have done. It is submitted that it was not irregular for him to say that though the appellant company was not legally identical with the old company, it was in all respects of fact identical with it.

Having traced the history of English legislation dealing with depreciation allowances, and referred to *In re Addie & Sons* (1); *Forder* v. *Handyside* (2); and *John Hall, Junior & Co.* v. *Rickman* (3), counsel continued: Deductions of 100 per cent. are not usual in the case of a continuing company. Depreciation is allowed merely for the purpose of taking care

(1) (1875) 1 Tax Cas. 1.
(2) (1876) 1 Ex. D. 233, 237.
(3) [1906] 1 K. B. 311.

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of the investment capital of the company, and the shareholders' interest in the company has been protected by a depreciation allowance of 100 per cent. As a matter of reasonableness the Minister was entitled to take into consideration the fact that there was no new shareholding interest in the appellant company. Once the capital investment had been protected no further allowance was permissible. When a second company is set up which has the same assets, the same capital investments, the same shareholders, and the same business in every respect, it is not unreasonable that the Minister should say that those shareholders have already been looked at in the past years, and that the change, while it has its legal consequences, does not invite him to look after the shareholders' interests again. As a matter of fact the appellant company has duplicated the old company. If the Minister would have been right in refusing a depreciation allowance to the old company, and it is submitted that he would have been, he was guilty of no impropriety in refusing it to the new appellant company.

Frank Gahan followed. The design of the Canadian Act in so far as depreciation is concerned is to say that there shall be no depreciation except such reasonable amount as the Minister shall allow in his discretion. The policy of the Parliament of Canada is to give such wide discretion to the Minister that he will be able, considering all the facts of the case, without being restricted by any legal theory or fact as to who is the owner, to make such allowance as in his discretion he thinks reasonable.

No reply was called for.

Oct. 13. The judgment of their Lordships was delivered by LORD THANKERTON. This appeal is taken from a judgment of the Supreme Court of Canada, dated December 12, 1938, which affirmed a judgment of the Exchequer Court of Canada, dated November 4, 1937, whereby the appellants' appeal from a decision of the respondent, affirming an assessment of the appellants to income tax for the tax year ending on March 31, 1933, was dismissed.

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The question in the appeal relates to the disallowance by the respondent of certain allowances for depreciation claimed by the appellants. In the return filed by the appellants in July, 1933, in compliance with s. 33 of the Income War Tax Act, R. S. C., 1927, c. 97, for the fiscal year ending March 31, 1933, the appellants disclosed gross earnings of $171,122.04, and claimed various deductions, including allowances for depreciation as follows :—

"Depreciation :—	Per cent.	$
"Machinery and Equipment	10	14,131.15
"Automobiles	20	2,935.08
"Horses	10	135.25
"Furniture and Fixtures ...	10	574.07
		$17,775.55"

On February 19, the Commissioner of Income Tax sent to the appellants a notice of assessment, in which the appellant's claim in respect of depreciation was disallowed except to the extent of $255.08 under the second item, in respect of two coupés and a truck body, which will be referred to later.

The appellants appealed to the respondent under s. 58 of the Act, but the appeal was dismissed by the respondent, and, the appellants, having filed a notice of dissatisfaction under s. 60, the respondent transmitted the papers to the Exchequer Court in terms of s. 63. Pleadings were ordered and filed, and, after trial, the appeal was dismissed by the Exchequer Court (Angers J.) on November 4, 1937. On appeal to the Supreme Court of Canada, the case was heard before the Chief Justice of Canada and Crocket, Davis, Kerwin and Hudson JJ., and on December 12, 1938, the Court dismissed the appeal, the Chief Justice and Davis J. dissenting.

The relevant facts may be summarized as follows : The appellant company was incorporated on March 23, 1932, and it acquired the machinery and equipment, etc., in respect of which the claim for depreciation has been disallowed from a company called the Home Service Company, Ld., at a price fixed by independent appraisal ; the correctness of this valuation has not been challenged by the respondent. The three items in respect of which the claim was admitted were acquired from other sources.

Home Service Company, Ld., was incorporated also on March 23, 1932, and on April 1, 1932, it acquired all the physical assets of seven companies, including the original Pioneer Laundry and Dry Cleaners, Ld., which had gone into voluntary liquidation on March 30, 1932. The machinery and equipment, etc., here in question were among the assets acquired by Home Service Company, Ld., from the original Pioneer Laundry and Dry Cleaners, Ld.

At this time all the outstanding share capital of the seven companies above referred to was owned directly or through nominees by a company called Pioneer Investment Company, Ld., the assets of which were also acquired by Home Service, Ld., with the exception of (*a*) shares owned by the former company, i.e., the shares of the seven subsidiaries which, by reason of the liquidation, became unsaleable, and (*b*) amounts owing to the former company by its shareholders. Pioneer Investment Company, Ld., went into voluntary liquidation on April 7, 1932.

The machinery and equipment, etc., here in question were fully written off by depreciation while they were in the ownership of the original Pioneer Laundry and Dry Cleaners, Ld.

All the share capital of Home Service Company, Ld., except forty shares out of 10,000 shares of par value of $100.00 each, was issued or sold to the liquidators of the operating subsidiary companies of Pioneer Investment Company, Ld., in consideration for the transfer of the assets of the operating companies to Home Service Company, Ld. On the winding-up of the operating companies these shares were distributed to the parent company, Pioneer Investment Company, Ld., and, on the winding-up of that company, were distributed to its own shareholders, with the admitted result that the shareholders of Home Service Company, Ld., are the same as were the shareholders of Pioneer Investment Company, Ld., and their respective holdings in the new company are the same, or substantially the same, as were their respective holdings in the old company. The forty

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shares referred to were allotted to Pioneer Investment Company, Ld., in part payment of the assets acquired from that company.

It is further agreed that during the fiscal year ended March 31, 1933, the shareholders of the appellant company were as follows, namely :—

	Shares.
Home Service Company, Ld.	97
Charles H. Wilson	1
Mary E. Stewart	1
Thomas H. Kirk	1
	100

and that the three persons named were during such fiscal year shareholders of the Home Service Company, Ld.

The amount of depreciation claimed by the appellant company in its statutory return was in conformity with the rates stated in certain circulars issued by the respondent to local officers of the department (Exhibits 3, 4, 5 and 6), and the appellants sought, because of their being made available to the public, to have them treated as an exercise by the respondent of his statutory discretion as to depreciation. Their Lordships agree with the view of Crocket and Hudson JJ. that these departmental circulars are for the general guidance of the officers, and cannot be regarded as the exercise of his statutory discretion by the respondent in any particular case. The other learned judges of the Supreme Court express no opinion on this point; the trial judge had expressed a contrary view.

The main question in the appeal relates to the discretion conferred on the respondent as to allowances for depreciation by the Income War Tax Act, R. S. C., 1927, c. 97, the material provisions of which are as follows :—

"3. For the purposes of this Act, 'income' means the "annual net profit or gain or gratuity, whether ascertained "and capable of computation as being wages, salary, or other "fixed amount, or unascertained as being fees or emoluments, "or as being profits from a trade or commercial or financial "or other business or calling, directly or indirectly received "by a person from any office or employment, or from any "profession or calling, or from any trade, manufacture or "business, as the case may be whether derived from sources "within Canada or elsewhere ; . . . ."

. . . .

"5. 'Income' as hereinbefore defined shall for the purposes "of this Act be subject to the following exemptions and "deductions :—

"(*a*) Such reasonable amount as the Minister, in his "discretion, may allow for depreciation, and the Minister in "determining the income derived from mining and from oil "and gas wells and timber limits shall make such an "allowance for the exhaustion of the mines, wells and "timber limits as he may deem just and fair ; . . . ."

. . . .

"6. In computing the amount of the profits or gains to be "assessed, a deduction shall not be allowed in respect of

. . . .

"(*b*) any outlay, loss or replacement of capital or any "payment on account of capital or any depreciation, "depletion or obsolescence, except as otherwise provided "in this Act ; . . . ."

In the first place, as to the nature of the discretion thus conferred on the Minister, Crocket and Hudson JJ. state (1) :—

"Reading these sections by themselves and without reference "to any outside authorities, it would seem fairly plain that it "was the intention of Parliament that there should be no "depreciation allowance unless the Minister, in his sole "discretion, decided that there should be. There is nothing "anywhere to indicate the principle or basis on which the "depreciation allowance is to be ascertained. It might vary "according to different accounting methods, different economic "theories, different general business conditions in the country. "Nor is there anything in the statute which denies a right in "the Minister to look beyond the legal facade for the purpose of "ascertaining the realities of ownership or the possibilities of

(1) [1939] S. C. R. (Can.) 9.

"schemes to avoid taxation, and it would seem to be that it "was the intention of Parliament that the Minister, and he "alone, could properly estimate these different factors.

"The authorities cited on behalf of the appellant are mostly "of statutes, somewhat differently worded from ours, and in "effect hold no more than that where the statute gives a "discretion to administrative officers and provides an area "in time or space for the exercise of such discretion, the "Commissioners must take that into account. In the present "case, the Minister has exercised his discretion and, as already "stated, the statute does not define or limit the field for "operation of such discretion."

Kerwin J. expressed a similar opinion.

Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J., in which the Chief Justice concurred, and in which he states (1): "The appellant "was entitled to an exemption or deduction in 'such reasonable "'amount as the Minister, in his discretion, may allow for "'depreciation.' That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to "be exercised on proper legal principles."

In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly "against sound and fundamental principles." (1)

The decision of the Commissioner of Income Tax in the present case, which is accepted by the respondent as his statutory decision, makes clear the point of principle which the appellants claim to have been thereby contravened; it is as follows: "The honourable the Minister of National "Revenue, having duly considered the facts as set forth in

(1) [1939] S. C. R. (Can.) 5.

"the Notice of Appeal and matters thereto relating, hereby "affirms the said assessment on the ground that while the "company was incorporated and commenced operations during "the year 1932 there was no actual change in ownership of the "assets purchased or taken over from Pioneer Investment "Company, Limited, by Home Service Company, Limited, "(of which the taxpayer is a subsidiary) and set up in the books "of the taxpayer at appreciated values; that in the exercise "of the statutory discretion, a reasonable amount has been "allowed for depreciation, and that the assessment is properly "levied under the provisions of the Income War Tax Act."

Their Lordships agree with the Chief Justice and Davis J. that the reason given for the decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company, and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company, and not its shareholders. Their Lordships agree with the reasons given by these learned judges, and their application of the authorities cited by them, and it is unnecessary to repeat them.

It follows that the assessment should be set aside, and the matter should be referred back to the respondent. It becomes unnecessary to consider a further question which was debated—namely, whether a taxpayer, who has already received in previous tax years allowance for depreciation amounting to 100 per cent. of the book value of the assets, is entitled to any further allowances.

Their Lordships will therefore humbly advise His Majesty that the decisions appealed from should be set aside, and that the assessment should be set aside and the matter referred back to the Minister. The appellants will have the costs of this appeal and the costs in the Courts below.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondent: *Charles Russell & Co.*

Referred to. Ex ors. of Hon. P. Burns, decd. *v.* Min. of Nat. Revenue
[1950] A. C. 213

[PRIVY COUNCIL.]

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MINISTER OF NATIONAL REVENUE . APPELLANT;

AND

TRUSTS AND GUARANTEE COMPANY, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income tax—Trust fund—Ultimate gift for charitable purposes—Accumulation of interest in Canada—For benefit of "unascertained persons"—Liability to tax—Not income of charitable "institution"—Interest on tax—Income War Tax Act, R. S. C., 1927, *c.* 97, *s.* 11, *sub-s.* 2; *s.* 4 (*e*); *ss.* 48, 49, 66.

By an indenture, dated May 27, 1918, made between the settlor and the respondent trustees various assets of the settlor were to be transferred to the respondents and were to be converted, and the net proceeds transferred to an investment account. The money so transferred was to constitute the capital of a trust fund, and was to carry interest at the rate of 5½ per cent. per annum, such interest being provided by the respondents. Out of that interest the respondents were to pay to the settlor during his life such sums as they might think fitting and proper for him to expend on his "living expenses"—which were not to include obligations incurred by him by speculation—and also a small sum for charitable purposes. The surplus of such interest was to be paid into the investment account at the beginning of each year and added to and become part of the corpus, and itself carry interest at 5½ per cent. That accumulation of interest was to go on until the expiration of twenty-one years from the death of the settlor, when the whole fund, with the accumulations, was to be paid by the respondents to the municipal council of the town of Colne, in Lancashire, England, "to be used by the said "council for the benefit of the aged and deserving poor of the "said town of Colne in such manner and without restriction of "any kind, as shall be deemed prudent to the said council . . . ." The settlor died in 1927:—

Held, that the aged and deserving poor of the town of Colne in 1948 were "unascertained persons" within the meaning of s. 11, sub-s. 2, of the Income War Tax Act, R. S. C., 1927, c. 97, and the interest, which was being accumulated in trust in Canada for their benefit, was accordingly taxable under s. 11, sub-s. 2, in the hands of the respondent trustees.

Sub-s. 2 of s. 11 applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons would or would not ultimately take a vested interest in such income, and whether they would or would not ever become entitled to specific portions of it.

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* *Present*: Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Romer.

In re McLeod v. *Minister of Customs and Excise* [1926] S. C. R. (Can.) 457 referred to.

Held, further, that although the trust regarded as a whole was a charitable trust, it was not a "charitable institution" within the meaning of s. 4 (*e*) of the Act, which exempts (inter alia) charitable "institutions" from income tax.

Held, lastly, that the powers given to the Court by s. 66 of the Act are in terms given subject to the provisions of the Act, and the Court has no power to waive the payment of interest chargeable upon the tax prior to the date of assessment in accordance with the provisions of ss. 48 and 49 of the Act.

Judgment of the Supreme Court of Canada [1939] S. C. R. (Can.) 125 reversed.

APPEAL (No. 41 of 1939), by special leave, from a judgment of the Supreme Court of Canada (December 19, 1938), reversing by a majority a judgment of the Exchequer Court of Canada (January 4, 1938).

By an indenture, dated May 27, 1918, made between one Peter Birtwistle, therein called the settlor, of the one part, and the respondents, Trusts and Guarantee Co., Ld., of the other part, various assets of the settlor which had already been, or were thereby, transferred to the respondents, were to be converted and got in by them, and the net proceeds, together with the net income of the assets pending conversion, after deduction of expenses, were to be transferred to an investment account. The money so transferred constituted the capital of a trust fund, and was to carry interest at the rate of 5¼ per cent. per annum, such interest being provided by the respondents. Out of that interest the respondents were to pay to the settlor during his life such sums as they might think fitting and proper for him to expend on his "living expenses," which expression, however, was not to be deemed to include any obligations incurred by the settlor by speculation. The respondents were also permitted to pay out of the income $150 a year to such charitable purposes as the settlor might request. The surplus of such interest was to be paid into the investment account on January 1 in each year, and added to and become part of the corpus, and itself carry interest at 5¼ per cent. That accumulation

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of interest was to go on until the expiration of twenty-one years from the death of the settlor, when the whole fund, with the accumulations, was to be paid by the respondents to the municipal council of the town of Colne, in Lancashire, England, " to be used by the said council for the benefit of "the aged and deserving poor of the said town of Colne in "such manner and without restriction of any kind, as shall "be deemed prudent to the said council. . . ." The settlor died in 1927.

In each of the years from 1919 to 1934, inclusive, the respondents reported to the appellant, the Minister of National Revenue, on the regular form required to be filed by trustees, the amounts of the income received by them under their trust, adding that " Income accrued to the municipal council "of Colne, England, for the benefit of aged and deserving poor." The appellant did not realize that the income was being accumulated in Canada, and said that he or his officials first became aware of that fact in 1935, and thereupon notices of assessment to income tax were served on the respondents in respect of each of the years 1919 to 1934, on the ground that it was " income accumulating in trust for the benefit "of unascertained persons" within the meaning of s. 11, sub-s. 2, of the Income War Tax Act, R. S. C., 1927, c. 97. The total amount claimed, including interest, was $36,053.25.

The appellant, on appeal by the respondents, affirmed the assessments, and his decision was affirmed by the Exchequer Court (Maclean J.). The Supreme Court of Canada (Duff C.J., Crocket, Davis and Hudson JJ., Kerwin J. dissenting), holding that the sub-section did not apply, allowed an appeal by the respondents and discharged the assessments. The appeal is reported at [1939] S. C. R. (Can.) 125.

1939. July 10, 11. *John Jennings K.C.* and *Frank Gahan* for the appellant. The principle of the Canadian taxing legislation is not taxation at the source, but taxation of the person who receives the income, and the onus is upon any one who seeks to escape from assessment to establish that he is exempt from the general principle of the Act. [Reference was made to the Income War Tax Act, R. S. C., 1927, c. 97, s. 11, sub-s. 2; ss. 9, 4 (*e*), 33, 48, 49, 66 and 68.] The purpose and intention of the Act is that each taxation period shall be taken by itself, and if within it the persons for whom the income accumulates during that period are unascertained and unascertainable, then the case falls entirely within the provisions of s. 11, sub-s. 2, and that is all that need be found to make the income for that period taxable. The question is whether the ultimate persons for whom the fund is accumulating are ascertained or ascertainable; it is immaterial what their interest is or may be, or whether they have an interest in the ultimate corpus. *In re McLeod* v. *Minister of Customs and Excise* (1); *Minister of National Revenue* v. *Royal Trust Company* (2); and *Minister of National Revenue* v. *Holden* (3), are cases which, up to the present appeal, have dealt with the interpretation of sub-s. 2 of s. 11, and it is submitted that they lay down principles inconsistent with the grounds upon which Davis J. rested his opinion in the present case. The benefit of the accumulated income is to be enjoyed by natural persons, who are the aged and deserving poor of Colne who may be selected in 1948 by the municipal council, and the particular individuals for whose benefit the income is accumulating must of necessity be unascertained and unascertainable.

If they seek to avoid the tax the respondents must find some statutory exemption which would take them out of the primary meaning of the Act. Sect. 4 (*e*) of the Act exempts (inter alia) charitable "institutions" from income tax, but there is a clear distinction between a charity or a charitable trust and a charitable institution. A charitable institution must be something of the nature of a permanent public organization, and not merely something to carry out the charity of one individual: *In re Douglas. Obert* v. *Barrow* (4), and *Adamson* v. *Melbourne and Metropolitan Board of Works.* (5)

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(1) [1926] S. C. R. (Can.) 457, 460, 471–2.

(2) [1931] S. C. R. (Can.) 485, 489.

(3) [1932] S. C. R. (Can.) 655, 661; [1933] A. C. 526, 531.

(4) (1887) 35 Ch. D. 472, 484.

(5) [1929] A. C. 142.

The Municipal Corporation of Colne could not be a charitable institution: Halsbury's Laws of England, 2nd ed., vol. iv., p. 336, art. 567. The respondents are apparently seeking support from a passage in the judgment of Lord Macnaghten in *Mayor, etc., of Manchester* v. *McAdam* (1), and they say that some vague thing may be a charitable institution without regard to any persons at all. It is submitted, however, that to suggest that a fund, apart altogether from those who have to administer it—something without personality whatever—can be an institution, is to misread the passage in question. The institution must be such as to be similar to an agricultural society or institution, or board of trade or chamber of commerce, that is, something which has permanence, a continuing policy and functions, and performing a public service in connection with some community. In any case, any question under s. 4 (*e*) of the Act is irrelevant if the case falls within sub-s. 2 of s. 11. The Income War Tax Act provided in ss. 48 and 49 for the charging of interest on arrears of income tax, and the Exchequer Court has not, under s. 66 or otherwise, any power to disallow such interest.

S. Casey Wood K.C. and *G. M. Jarvis* for the respondents. The settlor has made charity the recipient of his gift; he has created a charitable trust: Tudor on Charities, 5th ed., p. 2; *Mills* v. *Farmer* (2); *In re Willis. Shaw* v. *Willis* (3); and *Verge* v. *Somerville.* (4) The present trust is a charitable one, and the gift does not at any time vest beneficially in any particular person or persons. The trust being a charitable one, regard cannot be had " to the aged and deserving poor " otherwise than as a class of the community. To do so necessitates regarding them as a fluctuating body of individuals, and so to regard them destroys the legality of the trust as a charitable trust. Sect. 11, sub-s. 2, deals simply and solely with private trusts: Lewin on Trusts, 13th ed., p. 16. In this case there is a specific legatee, which is charity. Neither the municipal council of Colne nor the aged and deserving poor were unascertained persons within the meaning of s. 11,

(1) [1896] A. C. 500, 511.
(2) (1815) 19 Vesey, 483, 485.
(3) [1921] 1 Ch. 44, 46, 48.
(4) [1924] A. C. 496, 499

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sub-s. 2, of the Act. The accumulation was for the benefit of charity—the special legatee—and there is no uncertainty.

Neither the respondents nor the municipality of Colne are a charitable institution, but it is submitted that what the settlor created was a charitable trust and a charitable institution situated in Canada for the first twenty-one years after his death and thereafter in England. By the execution of the indenture he brought into being an undertaking or institution fully organized for carrying out the charitable intention, and the income of that charitable institution is, by the terms of s. 4 (*e*) of the Act exempt from taxation. On the meaning of " institution " see the dictum of Lord Macnaghten in *Mayor, etc., of Manchester* v. *McAdam.* (1) [Reference was also made to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2) ; *Keren Kayemeth le Jisroel, Ld.* v. *Inland Revenue Commissioners* (3) ; and *England* v. *Webb.* (4).]

G. M. Jarvis followed, and on the question of interest on the tax before the date of assessment referred to ss. 48, 49, 55 and 66 of the Act, and submitted that the words in s. 66 that " the Exchequer Court . . . . may make any order as "to payment of any . . . . interest . . . . as to the said "Court may seem right and proper " should be given their natural meaning and full effect. [Reference was made to *National Trust Co., Ld.* v. *Minister of National Revenue.* (5)]

October 12. The judgment of their Lordships was delivered by Lord Romer. This is an appeal by the Minister of National Revenue from a judgment of the Supreme Court of Canada, dated December 19, 1938, reversing by a majority a judgment of the Exchequer Court of Canada given in his favour on January 4, 1938.

The question to be determined on the appeal is whether the respondents, who are a Canadian company, are, as the trustees of an indenture of May 27, 1918, liable to be assessed to income tax in respect of the income accumulated by them during the years 1919 to 1934 inclusive, pursuant to the trust for accumulation contained in that indenture.

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(1) [1896] A. C. 500, 511.
(2) [1891] A. C. 531.
(3) [1931] 2 K. B. 465, 477.
(4) [1898] A. C. 758, 761.
(5) [1935] Ex. C. R. (Can.) 178.

The indenture, which was made between one Peter Birtwistle, therein called the settlor, of the one part, and the respondents of the other part, is of a somewhat unusual nature, and is by no means clearly worded. The effect of it, however, would seem to be as follows. Various assets of the settlor which had already been, or were thereby, transferred to the respondents were to be converted and got in by them, and the net proceeds, together with the net income of the assets pending conversion, after deduction of expenses, were to be transferred to an investment account. The money so transferred constituted the capital of the trust fund, and was to carry interest at the rate of 5¼ per cent. per annum, such interest being provided by the respondents. Out of this interest the respondents were to pay to the settlor during his life such sums as they might think fitting and proper for him to expend on his "living expenses," which expression, however, was not to be deemed to include any obligations incurred by the settlor by speculation. The respondents were also permitted to pay out of the income $150 a year to such charitable purposes as the settlor might request. The surplus of such interest was to be paid into the investment account on January 1 in each year, and added to and become part of the corpus, and itself carry interest at 5¼ per cent. This accumulation of interest was to go on until the expiration of twenty-one years from the death of the settlor, when the whole fund with the accumulations was to be paid by the respondents to the municipal council of the town of Colne, in Lancashire, England, "to be used by the said council for the benefit of "the aged and deserving poor of the said town of Colne in "such manner and without restriction of any kind, as shall "be deemed prudent to the said council. . . . ." In the meantime the respondents might invest the fund and its accumulations standing to the credit of the investment account in the purchase of, or loan upon, such securities as they thought fit. Any such investments, however, were to be at the risk of the respondents, who guaranteed the eventual payment to the said municipal council of the corpus of the fund together with the accumulations of the interest at the rate of 5¼ per cent. It was on the other hand provided that by way of remuneration for such guarantee, and for their management of the trust, the respondents should be entitled to retain for their own use and benefit "the surplus of interest "or profit, if any, resulting from the investment or loaning "of the said investment account over and above the rate "of interest (5¼ per cent.)." It was further provided that upon the payment over to the municipality of Colne at the expiration of the said period of twenty-one years from the settlor's death of the guaranteed sum, the securities then held by the respondents in respect of the investment account should become the property of the respondents freed from the trusts thereby created.

The events subsequent to the execution of this indenture that led up to the present appeal must now be stated.

In each of the years from 1919 to 1934 inclusive the respondents reported to the appellant on the regular form required to be filed by trustees and others acting in a fiduciary capacity the amounts of the income received by them under their trust. The purpose of this return is for information and not for taxation, inasmuch as the Dominion income tax legislation does not, speaking generally, provide for taxation by deduction at source of trust income in the hands of trustees, but imposes the tax directly upon the beneficiaries who are entitled to receive that income. The return to be made by the trustees must therefore give the names and addresses of the beneficiaries who are so entitled. In the present case, accordingly, the respondents, after stating in each return the income of the trust for the year in question (which presumably was the surplus for that year of the interest that they had guaranteed), added the following words: " Income accrues to the municipal council of Colne, "England, for the benefit of aged and deserving poor." Now, had the income been applied each year for the benefit of such aged and deserving poor instead of being subject to the trust for accumulation, the income would not have been liable to taxation under the income tax legislation of the Dominion, one sufficient reason being that the beneficiaries under the trust were not resident in Canada. But the Income War Tax Act of 1920 contained a section, which was deemed to have come into force at the commencement of the 1917 taxation period, and which was reproduced verbatim as s. 11, sub-s. 2, of the Revised Statutes of 1927, chapter 97. It was in these terms: " Income accumulating in trust for "the benefit of unascertained persons, or of persons with "contingent interests shall be taxable in the hands of the "trustee or other like person acting in a fiduciary capacity, "as if such income were the income of an unmarried person." The section was repealed by s. 7 of chapter 55 of the statutes of 1934, but re-enacted in the same form, except that for the concluding words " an unmarried person " there were substituted the words " a person other than a corporation," followed by a proviso that is not material for the present purpose.

It appears that the appellant, and the officials administering the Income War Tax Act under him, failed to realize that the income referred to in the respondent's returns was being accumulated by the respondents in Canada. He says that he, or his officials, first became aware of this fact in the year 1935 in consequence of certain proceedings relating to the trust taken in that year in the Supreme Court of the Province of Ontario. He therefore caused notices of assessment to income tax to be served upon the respondents in respect of each of the years 1919 to 1934. The total amount claimed, including interest, was $36,053.25. The respondents then appealed to the Minister against the assessments. They contended that the income was being accumulated either for the benefit of the municipal corporation of Colne, or for the benefit of the aged and deserving poor of that town, and that neither the municipal corporation nor the aged and deserving poor were unascertained persons within the meaning of the Act. They contended, alternatively, that the income in question was the income of a charitable institution, and as such exempted from taxation by virtue of s. 4 (*e*) of the

Income War Tax Act, chapter 97 of the Revised Statutes, 1927, which exempts "the income of any religious, charitable, "agricultural and educational institutions, boards of trade and "chambers of commerce."

It should be stated that Peter Birtwistle, the settlor, had died in the year 1927.

The appeal was dismissed by the Minister, the present appellant, who by his decision, dated April 21, 1936, affirmed the assessments. The respondents thereupon gave notice of dissatisfaction in accordance with the provisions of s. 60 of the said Act, and the matter in due course came on for hearing in the Exchequer Court before Maclean J. The learned judge affirmed the Minister's decision. He held that the income was not being accumulated for the benefit of the town of Colne, but for the benefit of a class of which the members are presently unascertainable and will always be fluctuating. He held further that neither the respondents nor the municipal council of Colne, nor the town of Colne nor the trust fund itself, were charitable institutions. He also decided that interest on the income tax had been properly charged, a matter that will be dealt with more fully later on. By judgment, dated January 4, 1938, the respondent's appeal was dismissed, without costs.

The respondents thereupon appealed to the Supreme Court of Canada, where the case was heard by the Chief Justice and Crocket, Davis, Hudson and Kerwin JJ. In the result the appeal was allowed, with costs there and below (Kerwin J. dissenting), and the assessments were discharged. Davis J., in whose judgment the Chief Justice and Crocket J. concurred, was of opinion that s. 11, sub-s. 2, of the Act of 1927 had in contemplation income that would vest in and ultimately pass to persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights were for the time being merely contingent interests. But under the trust now in question, he said, no particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or any part thereof. He held, therefore, that the sub-section did not apply. Hudson J. also thought that the persons referred to in the sub-section were persons who might become entitled to specific portions of the fund.

Their Lordships are unable to take this view of the matter. They can find no warrant for introducing into the sub-section a qualification that is not there. In their Lordships' opinion, the sub-section applies in every case where income is being accumulated in trust for the benefit of unascertained persons whether those persons will or will not ultimately take a vested interest in such income, and whether they will or will not ever become entitled to specific portions of it. In the present case the accumulated interest in the hands of the respondents as trustees will in the year 1948 have to be handed over to the municipal council of Colne as trustees in trust to be applied for the benefit of the aged and deserving poor of that town. Such aged and deserving poor are without any question persons, and equally without question they are unascertained. The case, therefore, seems to fall within the very words of the sub-section. This was the view of the matter that commended itself to Kerwin J.

It is moreover to be observed that in an earlier decision of the Supreme Court the sub-section was held to be applicable to a case in which it was possible that no person would ever acquire a vested right in any specific portion of the income that was being accumulated. This was the case of *In re McLeod* v. *Minister of Customs and Excise.* (1) In that case income of a residuary fund was being accumulated for twenty-one years from the death of a testator, at the end of which time the whole fund was to be conveyed to his three children, but so that if any child were then dead his share was to be divided by the trustees of the will amongst the testator's grandchildren, if any, as the trustees might think best. Not only, therefore, were the persons for whom the interest was being accumulated unascertained, but in the event of one of the testator's children dying before the expiration of the twenty-one years, it could not be said, at the end of that period, of any grandchild that he was entitled to receive any specified portion of the trust fund any more than in the present case it will be possible to say it of any of the aged and deserving poor in the town of Colne in the year 1948.

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(1) [1926] S. C. R. (Can.) 457.

In view of the construction put by the majority of the Supreme Court upon s. 11, sub-s. 2, of the Act it was not necessary for them to express any opinion upon the question whether the respondents could succeed upon the ground that the income in question was exempted from taxation as being income of a charitable institution, or upon the question whether interest was properly chargeable upon the tax prior to the date of assessment. Kerwin J., however, dealt with both of these questions, and decided both of them adversely to the respondents. In their Lordships' opinion he was right in so doing.

As to the first of these questions, it would appear from the judgment of Maclean J. that the respondents had contended before him that the respondents themselves or the municipal council of Colne, or the town of Colne, were charitable institutions. Any such contention is obviously absurd, and was very properly omitted from the argument on behalf of the respondents before this Board. It was, however, strenuously urged before their Lordships that the trust regarded as a whole was a charitable institution. That it is a charitable trust no one can doubt. But their Lordships are unable to agree that it is a charitable institution such as is contemplated by s. 4 (*e*) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the sub-section in question that the word is intended to connote something more than a mere trust. Had the Dominion Legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used, it seems to their Lordships that the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity

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organisation society, or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the sub-section if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the sub-section.

It only remains to deal with the question of the interest charged upon the tax prior to the date of assessment. The question turns upon ss. 48, 49 and 66 of the Act.

Sect. 48 is in these terms: "Every person liable to pay "any tax under this Act shall send with the return of the "income upon which such tax is payable not less than "one-quarter of the amount of such tax, and may pay the "balance, if any, of such tax, in not more than three equal "bi-monthly instalments thereafter, together with interest "at the rate of six per centum per annum upon each instalment "from the last day prescribed for making such return to the "time payment is made."

Sect. 49 provides as follows: "If any person liable to pay "any tax under this Act pays as any instalment less than "one-quarter of the tax as estimated by him, or should he "fail to make any payment at the time of filing his return "or at the time when any instalment should be paid, he "shall pay, in addition to the interest at the rate of six per "centum per annum provided for by the last preceding section, "additional interest at the rate of four per centum per annum "upon the deficiency from the date of default to the date of "payment."

In each of the years 1919 to 1934 the respondents failed to make any payment at the time of filing their returns, or at the time when subsequent instalments under s. 48 should have been paid. They became, therefore, chargeable with the additional interest prescribed by s. 49 in addition to the interest mentioned in s. 48. This they do not deny. Their contention that in the circumstances the interest should not be charged is based upon s. 66, which is in these terms: "Subject to the provisions of this Act, the Exchequer Court "shall have exclusive jurisdiction to hear and determine all "questions that may arise in connection with any assessment "made under this Act and in delivering judgment may make "any order as to payment of any tax, interest or penalty "or as to costs as to the said Court may seem right and "proper."

It is contended that this provision gives to the Court a discretion to determine whether interest shall or shall not be exacted from the taxpayer.

Their Lordships cannot accede to this contention. The powers given to the Court by the section are in terms given subject to the provisions of the Act, and therefore subject to the provisions of ss. 48 and 49. The Court has no more power under the sections to waive the payment of the interest than it has to waive the payment of any tax imposed by the Act, or to impose a greater rate of interest or a larger amount of tax than the Act provides. The section is merely an enactment conferring upon the Exchequer Court exclusively the jurisdiction of dealing with disputes arising in connection with assessments made under the Act; and, as regards tax, interest and penalties, its powers are confined to seeing that they are only charged in strict accordance with the Act. As regards costs the Court has no doubt a complete discretion.

For these reasons their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be allowed; that the judgment of the Supreme Court of December 19, 1938, should be discharged, and the judgment of the Exchequer Court of January 4, 1938, restored. The respondents must pay the appellant's costs of this appeal and of the appeal to the Supreme Court.

Solicitors for the appellant: *Charles Russell & Co.*
Solicitors for the respondents: *Blake & Redden.*

Followed. DAVIES *v.* SWAN MOTOR CO. [1949] 2 K. B. 291

Dictum of LORD ATKIN, at p. 164, *applied.* DAVIES *v.* SWAN MOTOR CO., LTD. [1949] 1 All E.R. 620.

[HOUSE OF LORDS.]

H. L. (E.)* CASWELL . . . . APPELLANT;

AND

POWELL DUFFRYN ASSOCIATED COLLIERIES, LIMITED . . . . RESPONDENTS.

1939

May 4, 5, 8, 9, 15, 16; *July* 25.

Mine—Unfenced machinery—Accident to workman—Failure of mine-owners to provide for notice of starting of machinery—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 55, 102, *sub-s.* 8.

The respondents had in their colliery conveyor belts for transporting coal from the face to trams which by a rope haulage system conveyed it to the pit bottom. Sometimes portions of the coal, when damp, adhered to the surface of the belt and caked into hard obstructions, causing the belt to run out of alignment; and to prevent this it was the duty of a workman, C. periodically to clean the upper roller by means of a scraper. In order to do this C. had to take off a movable plate from the machine operating the belts. This machine was put in motion and off again by a lever operated some distance away. C. had been told that he must not clean the roller while the machinery was in motion, and, further, he was instructed to replace the plate when he had finished cleaning. One day, after some journeys of the belt, the machine stopped, and the dead body of C. was found caught by the arm between the belt and the roller. The movable plate was found standing against the fixed plate below. No system of signalling or calling to the cleaner before starting or restarting the machine was in use in the mine, and it was therefore possible for it to be started while the cleaner was at work cleaning the roller. In an action by the mother of C. claiming damages under the Fatal Accidents Acts and as his administratrix:—

Held, that the respondents were under a duty to see that the plate was replaced before the machine was restarted and had failed to comply with that obligation; that a system which involved work being done at a machine which might be set in motion without any signal to the workman engaged in cleaning it was defective; that the respondents had failed to show that it was not reasonably practicable to avoid or prevent the breach; and therefore that they were liable in damages.

An action in respect of injuries caused by a breach of statutory duty does not differ from an action in respect of injuries caused by any other wrong. The defendant in such an action will succeed if he proves that the injury was caused wholly or in part by the omission of the workman to take the ordinary care that would be expected of him in the circumstances; but the care to be expected of the workman may vary with the circumstances, and a different degree of care may well be expected from a workman in a factory or mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of the factory or mine.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

Per Lord Wright. An action claiming damages for breach of statutory duty is not completely or accurately described as an action in negligence; it is a common law action based on the purpose of the statute to protect workmen, and it belongs to the category often described as that of cases of strict or absolute liability. At the same time, it resembles an action in negligence in that the claim is based on breach of a duty to take care for the safety of the workmen. English law has, however, accepted contributory negligence as a defence in this class of action, but the policy of the statutory protection would be nullified if a workman were held debarred from recovering because he has been guilty of some carelessness or inattention to his own safety which, though trivial in itself, threw him into the danger consequent on the breach by his employers of their statutory duty. It is the breach of the statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury.

Statement of the law by Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* [1934] 2 K. B. 132, at pp. 139, 140 approved.

Decision of the High Court of Australia in *Bourke* v. *Butterfield and Lewis, Ld.* (1926) 38 C. L. R. 354 considered.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

The plaintiff, the mother of a young man who was killed while working underground in a pit belonging to the respondents, sued under the Fatal Accidents Acts, and as administratrix of his estate, to recover damages on the ground that her son's death was caused by a breach of the duty imposed upon the respondents by s. 55 of the Coal Mines Act, 1911, which provides that "every fly-wheel and all "exposed and dangerous parts of the machinery used in or "about the mine shall be kept securely fenced." Five days before his death the appellant's son, Arthur Caswell, had been given the work in the mine at which he was killed. The respondents had installed a system of conveyor belts which transported the coal, when gotten, from the face to trams in which by a rope haulage system it was eventually conveyed to the pit bottom. The conveyor belt which was rather less than three feet wide, passed along the roadway, being supported on trestles with rollers. The belt was driven by a compressed air turbine actuating three drums, this engine being at the side of the roadway. After the installation of this apparatus it was found that when the coal was damp, portions adhered to the surface of the belt and caked into hard obstructions, causing the belt to run out of alignment, and it was part of Caswell's duty to clean, when necessary, the upper roller when so obstructed, and to enable him to do this he was provided with iron scrapers. To clean the roller he had to remove the upper movable plate. He was told that he must not clean the roller while it was in motion, and, further, that he must replace the plate when he had finished cleaning. The machine in question was put in motion and stopped by a lever operated by a man some distance away, but there was no system of signalling or calling to Caswell, the cleaner, before the machine was started or restarted. A few days after he had been engaged in the work of cleaning the rollers his dead body was found close to the machine, he having been caught between the belt and the rollers, but how precisely this happened did not appear.

The action was tried by Humphreys J., who held that the plaintiff had failed to discharge the onus of proving either negligence or a breach of statutory duty on the part of the defendants and he gave judgment in their favour, and that judgment was affirmed by the Court of Appeal (Greer, Slesser and MacKinnon L.JJ., Slesser L.J. dissenting).

The plaintiff appealed to this House.

D. P. Maxwell Fyfe K.C. and *Joshua Davies K.C.* for the appellant. There having been a breach by the respondents of the duty imposed upon them by statute to have the dangerous machine securely fenced, and the deceased workman having met his death as a consequence of such breach, the respondents are liable in damages to the appellant. The mere fact that the deceased was caught and killed by the machine in the way he was, is evidence of a breach of the statute, calling upon the respondents to show, and they have failed to show, that it was impracticable to have the machine securely fenced or in such a condition as not to be a source of danger. In *Coltness Iron Co., Ld.* v. *Sharp* (1) this House held that, as it was not reasonably practicable to keep the machinery there in question securely fenced, seeing that it had to be observed while being tested, the appellant company were entitled to protection from liability in respect of an accident to a workman who was caught in the unprotected gearing. No such claim to exemption from liability is possible in the present case. *Carey* v. *Ocean Coal Co., Ld.* (2), decided that the duty to fence exposed and dangerous parts of machinery imposed by s. 55 of the Coal Mines Act, 1911, is even higher than that imposed by s. 10 of the Factory and Workshop Act, 1910 : see also *Wing* v. *Soar.* (3) As was said by Lord Wright in *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (4), the provisions of the Coal Mines Act, 1911, requiring that the roof of every working place shall be made secure, "clearly belong to the class which "impose a duty on the employer to take certain precautions "for the protection of his workmen ; it is absolute in its terms," save where it is not reasonably practicable to avoid or prevent a breach : see also *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (5) So in this case the obligation on the respondents to fence the machine was absolute. No contributory negligence by the deceased was shown. In *Pringle* v. *Grosvenor* (6), the Court of Session held that where a workman in a factory is injured by an accident which would not have happened if the gearing had been properly fenced as required by statute, the employer cannot escape liability by the fact that the accident was partly due to a mistake on the part of the workman : see also *Gibb* v. *Crombie.* (7) In the Australian case of *Bourke* v. *Butterfield and Lewis, Ld.* (8), it was held that contributory negligence is not a defence to an action to recover damages for personal injury caused by a breach of an absolute duty imposed for the benefit of a class of persons, e.g. workmen ; see also *Groves* v. *Wimborne* (*Lord*) (9), where it was said that the

(1) [1938] A. C. 90.
(2) [1938] 1 K. B. 365.
(3) [1938] 1 K. B. 379*n*.
(4) [1934] A. C. 1, 22.
(5) [1936] A. C. 206.
(6) (1894) 21 R. 532.
(7) (1875) 2 R. 886.
(8) (1926) 38 C. L. R. 354.
(9) [1898] 2 Q. B. 402.

defence of common employment is not applicable in a case where injury has been caused to a servant by a breach of the absolute duty imposed upon the master for the servant's protection: see also *Britton* v. *Great Western Cotton Co.* (1); and *Blenkinsop* v. *Ogden.* (2) The duty of the respondents to fence the machine was absolute: see *Vincent* v. *Southern Ry. Co.* (3) In *Senior* v. *Ward* (4) it was held that where a servant is killed or injured by accident resulting from the habitual negligence of a fellow workman acquiesced in by the employer, the latter is liable unless there has been contributory negligence by the servant. In *Clarke* v. *Holmes* (5), Cockburn C.J. pointed out that even if the plaintiff in that case, who was injured by unfenced machinery, knew that it was unfenced, that was only a fact in the case, to be taken into consideration by the jury with all the other facts and circumstances, in determining whether the plaintiff had himself helped to bring about the accident in respect of which he sought to charge the defendant. Here, the fact that this machine could be restarted without communication with the cleaner was clearly a dangerous method of working.

Sir William Jowitt K.C., *Trevor Hunter K.C.* and *Godfrey Parsons* for the respondents. The machine in question was properly fenced on the morning of the accident and some one must have removed the protecting plate. We submit that this must have been done by the deceased man himself. That is the most likely explanation of how the accident occurred. With regard to the law, in such a case as this it is for the plaintiff to establish the breach of the statutory duty to fence machinery causing the accident: see *Grand Trunk Ry. Co.* v. *McAlpine* (6); and contributory negligence is an answer to such a claim: see per Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.* (7), where he pointed out that the decision of the Australian Court in *Bourke* v. *Butterfield and Lewis, Ld.* (8), to the effect that contributory negligence is not a defence in such an action, is inconsistent with the English authorities.

(1) (1872) L. R. 7 Ex. 130.
(2) [1898] 1 Q. B. 783.
(3) [1927] A. C. 430.
(4) (1859) 1 E. & E. 385.
(5) (1862) 7 H. & N. 937, 945.
(6) [1913] A. C. 838.
(7) [1934] 2 K. B. 132.
(8) 38 C. L. R. 354.

If, then, the deceased was the cause, or one of the main causes, of the injury which happened, his representative cannot recover, seeing that the deceased had the plainest possible warning that he must not clean the roller while the machine was in motion as it was highly dangerous to do so.

D. P. Maxwell Fyfe K.C. replied.

The House took time for consideration.

1939. July 25. LORD ATKIN. My Lords, this is an appeal from a decision of the Court of Appeal who dismissed an appeal from a judgment of Travers Humphreys J. in favour of the defendants at the trial at the Cardiff Assizes in December, 1937. The appellant, the plaintiff in the action, is the mother of a young man, Arthur Caswell, who was killed while working underground at the Pandy Pit of the Naval Colliery, Penygraig, belonging to the respondents. She sues under the Fatal Accidents Acts, and also as administratrix of his estate to recover damages on the ground that his death was caused by a breach of a statutory duty imposed upon the defendants by s. 55 of the Coal Mines Act, 1911. That section prescribes " every fly-wheel and all exposed and dangerous "parts of the machinery used in or about the mine shall be kept "securely fenced." Caswell had been employed at the pit since he was fifteen. At the time of his death he was twenty-two. Five days before his death he had been given the work at which he was killed. The facts of the case as they emerged in this House are as follows. They were not fully ascertained in the Courts below, a circumstance which is especially unfortunate in view of the fact that the inquiry was into the conditions attending the death of a workman. The parties, however, gave every assistance to place the full facts before this House. It appears that about fifteen months before the date of the occurrence in question the defendants had installed a system of conveyor belts which transported the coal when gotten from the face to trams in which by a rope haulage system it was eventually conveyed to the pit bottom. The conveyor belt, which directly led the coal to the trams, is the one with which this case is concerned: it was in fact fed by two other conveyor belts communicating with the face. The belt, which was rather less than 3 feet wide, passed along the roadway, being supported on trestles with rollers until it reached the chute, down which it deposited its load into trams. The trams were made up in "journeys" of fifteen trams, and unloaded were drawn in turn beneath the chute which had a device to check the discharge during the interval between one tram and the next. The belt itself during the loading went on revolving. As the belt discharged its load it passed round a roller or pulley and proceeded on its return journey immediately below the full portion. It was, of course, reversed so that the surface which had been uppermost and in contact with the coal was now undermost. The belt was driven by a compressed air turbine actuating three drums, pulleys or rollers, as they have been called in the case, each of 12 inches diameter and about 3 feet in width. This engine was at the side of the roadway: the upper belt with the coal passed over it: the lower belt passed into it at the top of the engine and passing over the three rollers received its motive force. It passed into the machine at the height of about 6 feet. Originally the whole structure was enclosed, but after a year's working it was found necessary to have facilities for access to the top roller, the point met by the belt, for the purpose of cleaning. It was found that when the coal was damp, portions of coal and slimy stuff adhering to the surface of the belt would cake into hard obstructions on the surface of the roller, and cause the belt to run out of alignment. For this purpose the upper portion of the plate on the approach side of the engine was made detachable. The machine remained enclosed up to the height of about 4 feet 5 inches, and the remaining portion, about 1 foot 6 inches, was loose, and was fitted into a slot so as to be removed and replaced without much difficulty. It was about 3 feet wide, and to remove or replace it the operator had to stand in front; apparently it could not be placed in the slot from the side. From the line of the plate to the nearest portion of the roller was a distance of 2 feet. To the bite of the roller and the belt was 2 feet 9 inches. Part of Caswell's duty was to clean this upper roller when necessary. For this purpose he was provided with two iron scrapers which were produced at the hearing. They were heavy implements about 4 feet in length, shaped like a hoe, the scraper end was about 6 inches in width; at the other end there was a rough handle in the shape of a ring. They were sufficiently heavy to make it improbable that a man would seek to handle them with only one hand. He could not, of course, clean the roller without removing the movable plate. The machine was about 12 yards away from the chute end of the belt. It was put in motion and off again, not at the machine itself, but by a lever at this chute which was in charge of an assistant foreman, at this time Christopher Williams. The remaining work of Caswell was to bale the water that accumulated at this part of the roadway. The tramway was laid on sleepers laid transversely in the usual way; but sleepers were put down by the side of the tram lines and parallel with them to afford a footing, and intervals were left between these sleepers to afford a sump or sumps from which the water could be withdrawn. For this purpose Caswell was provided with a bucket with which he baled the water either into a cask on one of the trams at the beginning of the first shift and afterwards into any empty tram that might be standing by. As far as his duties of cleaning the roller were concerned, it was proved that he had received instruction that he was not to clean while the machinery was in motion and that he was to replace the plate when he had finished. On the day in question four journeys had been completed. The men were engaged in loading the fifth journey; they had loaded three out of the fifteen trams, the fourth was under the chute when the machinery stopped. They went to the machine, and there they found the dead body of the unfortunate Caswell; his right hand was outstretched, caught between the belt and the roller and his head was drawn up against the roller; his neck was broken. The body was drawn up so that his feet were two feet from the ground, and beneath his feet and lying in water beneath his feet was one of the iron

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scrapers. The movable plate was standing up against the fixed plate below.

It is in these circumstances that this action was brought. It seems to me quite clear that this machinery when unfenced and in motion was dangerous; that it was not fenced at the time and therefore was not left fenced; and that the omission to keep the machine fenced "materially contributed to the "injury or death complained of," to use the text of Lord Watson in *Wakelin* v. *London and South Western Ry. Co.* (1) It would appear, therefore, that the defendants would be liable unless they proved—(*a*) under the terms of s. 102, sub-s. 8, of the Coal Mines Act that it was not reasonably practicable to avoid or prevent the breach, or (*b*) that a contributory cause of death was the negligence of the deceased workman. It will be convenient to deal with the second defence first, for the principal discussion in the case was on that topic.

There were four ways in which it was possible for Caswell to have cleaned the roller. The first, the forbidden way, was to scrape the dirt off the roller while it was in motion, i.e., while the conveyor belt was actually discharging into the trams. This was, as the assistant manager proved, forbidden. The plaintiff called three trustworthy trade union officials who deposed interviews with the manager in which he had said that this was the only way in which the roller could be cleaned. The manager deposed that he was misunderstood. He was referring to another method which is later to be described. The learned judge who saw the witness accepted the manager's explanation, and we cannot differ from his finding. The plaintiff also called a witness, Howells, who was at the time of the accident working at the mine. He not only spoke of this practice but said that no scrapers were provided—only a long rod; that the movable plate was always absent, and that cleaning was constantly done by hand. The trial judge entirely disbelieved this witness with good reason. The defendants' witnesses made it plain that the dirt on the roller caked into hard excrescences which could not be flicked off by the hand but had to be hit off with the scraper. There is

(1) (1886) 12 App. Cas. 41, 47.

no evidence that Caswell ever cleaned the roller while in motion, and it seems reasonably clear that at any rate at the time of this accident he was not doing so. It would, according to the defendants' own evidence, be very unlikely that he would be doing such a futile thing as to use his hand alone, and if he were using the scraper—(*a*) his hand would not have got into a position to be caught, (*b*) the scraper would not have been found in the position where it was, lying at his feet. The second method was to clean the roller while the trams were being loaded. It might happen that the belt would be out of alignment or even stop because of obstruction on the roller. In these circumstances, Williams, of his own accord or on a hail from the cleaner, would stop the engine. The roller would be cleaned and a half-turn given so as to expose and clean the whole, and when finished, on another shout from the cleaner, the conveyor would be started again. This involved, of course, stopping the conveyance of coal throughout the entire part of the mine served by the conveyors, and seems a course which a boy of twenty-two would be disinclined to take on his own initiative. On the day in question it had not been adopted, for the machinery had never stopped except during the changing of the journeys. The third method was that which the manager said gave rise to the misunderstanding at the interviews. While the machinery was stopped, during the changing of the "journeys," a period of about fifteen minutes, the exposed portion of the roller would be cleaned by the scraper; the cleaner would then call for another half-turn of the machine and the other half of the roller would be so exposed and cleaned. This would have been a simple method; it seems to have been assumed at the trial that it was the normal method, and I think it clear that the trial judge so thought. But on ascertaining the facts for this House it was made clear that this was not how it was done. The system of working required Christopher Williams, who was in charge of the lever operating the machine, to leave the spot at the chute where the lever was and attend the outgoing journey up to the spot about 80 yards away where there were double lines of tramway, detach one end of the haulage rope from the outgoing journey, attach it to the incoming journey of empty trams and accompany the latter to the chute. During this time, therefore, there was no one available to give the necessary half-turn, and this reasonably safe and effective system was not adopted. The fourth method was to wait until the machinery had stopped for the change of journeys and then clean the half of the roller which happened to be exposed, waiting to clean the remainder of the roller when it came into view at a subsequent stop. This was somewhat fortuitous for the cleaned portion might come up again at the next stop. I think, however, that it is almost demonstrable that this was the method adopted by Caswell on this morning. The first method, cleaning in motion is, I think, negatived by the evidence. The second and third were not used that morning as is shown by Williams's evidence as to the engine. As to the fourth, I think there must have been some occasion to clean. The manager said the roller required cleaning twice an hour; the movable plate had been taken off; and one scraper at least had been handled by Caswell, for it was lying at his feet and not at the side where it had been left by the night overman at the end of the night shift.

Is there then any evidence that Caswell had been guilty of negligence contributing to the accident? If there is it must be in the fact that he had not replaced the movable plate. That he was authorized, indeed bound, to remove it from its closed position is manifest. The machine could not be cleaned unless he did. The facts seem to show that he had been using the scraper to clean the roller while at rest. Is it proved that he was negligent in not replacing the plate? Now it is quite plain that there was no system of signalling or calling to the cleaner before starting the engine for the new journey. It was therefore perfectly possible for the machinery to start while the cleaner was at work at the roller. What was he then to do? He would cease cleaning and put down his scraper. The plate could only be replaced while facing the moving machinery, and I cannot think that it was negligent on his part to incur this particular risk once the machinery started. The plate would have to be lifted to within about two or three inches at the most from the moving belt. I think it would be fair to conclude not only that it was not negligent to omit to replace the plate in the circumstances but that caution required that it should not be replaced. But if there was no negligence proved in not replacing the plate what other careless act of omission or commission is proved ? Clearly none. What precisely happened is not known. It is perfectly possible, as pleaded in the alternative of the defendants themselves, that the unfortunate man slipped and stumbled with his arm through the opening and thereby was caught. Four or five minutes probably elapsed from the time the machinery started. I cannot see that he was doing anything careless in standing near the orifice during that period or perhaps taking the preliminary steps to resume his other job of baling. I should add that I do not think he is shown to be careless by not noticing either from the lapse of time or from the passing of the journey of empty trams that the stop interval was coming to an end. If closely engaged in cleaning he might well be regardless of time. I come to the conclusion, therefore, that the defendants have not established any contributory negligence on the part of the deceased man. I propose, however, later to say something on the interesting question whether any and what contributory negligence affords a defence to such an action as this.

I will, however, first discuss the other defence I mentioned under s. 102, sub-s. 8, of the Act. As to this it is plain that the defendants were entitled to entrust the cleaner with the duty of removing this guard, for the roller could not otherwise be cleaned. It was their duty, however, to see that the guard was replaced ; and though primarily that had to be done by the cleaner, yet it was their duty to see that such a system of working was adopted as made the performance of that duty practicable with reasonable safety. A system which involved work being done at a machine which might be set in motion without any signal to the workman engaged in cleaning it seems to me most defective. Any kind of signal could have been employed which would give the cleaner time to stop cleaning and close the fence. The defendants entirely fail, in my judgment, to show that "it was not reasonably practicable "to avoid or prevent the breach."

Though I have come to the conclusion that in this case the defendants failed to prove negligence on the part of the deceased workman, I feel bound to say something on the topic which was much discussed in argument, whether contributory negligence is ever a defence to an action based upon a breach of a statutory duty, or, more narrowly, based upon a breach of a statutory duty to protect workmen and others imposed by such Acts as the Factory, Mining Acts, etc. Authority for the proposition that contributory negligence in the ordinary sense is not a defence to such an action is to be found in the judgment of the High Court of Australia in *Bourke* v. *Butterfield and Lewis, Ld.* (1) The argument is that safety obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are careless, and that the object of the Legislature is defeated if the right to sue for injuries caused by the breach of the safety regulations is denied to the careless workman for whose benefit, amongst others, the legislation was specially enacted. I venture to think that this attractive theory does not give sufficient weight to the true cause of action in such cases. The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which " contributes to cause " the injury, a phrase which I take from the opinion of Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (1) And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who " caused " the injury; and you must not be deterred because the word " cause " has in philosophy given rise to embarrassments which in this connection should not affect the judge. Nor is this question of contributory negligence one that arises only in cases where the defendant is charged with negligence, as though the negligences belong to the same pack and one trumps the other. In the leading case of *Butterfield* v. *Forrester* (2) the action was a case for obstructing the highway whereby the plaintiff was injured. No negligence appears to have been alleged and the action appears to have been a simple action for a nuisance on the highway. The authority cited in argument from Buller's Nisi Prius, 26.9. so describes the action. I quote from the 7th ed., of 1817; "So if a man "lay logs of wood cross a highway, though a person may "with care ride safely by, yet if by means thereof my horse "stumble and fling me I may bring an action: for wherever "a man suffers a particular injury by a nuisance he may "maintain an action." Yet it is in such an action that Lord Ellenborough laid down the classic rule: " One person being "in fault will not dispense with another's using ordinary care "for himself." And the omission by the plaintiff to use ordinary care may be the sole cause of the injury as was held in *Butterfields'* case (2), or have contributed to cause the injury as in the numerous cases which appear in the books. It may be said finally that if contributory negligence is not regarded from the point of view of causation it is difficult to see how damage comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons of authority think should be adopted in ours.

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(1) 38 C. L. R. 354.

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(1) (1876) 1 App. Cas. 754.

(2) (1809) 11 East, 60.

I cannot therefore accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.

But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine. I agree with the statement of Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1), cited by my noble and learned friend Lord Wright (2): "I think of course "that in considering whether an ordinary prudent workman "would have taken more care than the injured man, the "tribunal of fact has to take into account all the circumstances "of work in a factory, and that it is not for every risky thing "which a workman in a factory may do in his familiarity with "the machinery that a plaintiff ought to be held guilty of "contributory negligence." This seems to me a sensible practical saying, and one which will afford all the protection which is necessary to the workman. I cannot go further with the High Court of Australia and limit contributory negligence in this kind of case to wilful or serious misconduct. I have already said that I see no ground for imputing any negligence to the deceased man in the present case judged by any standard; but in any case, judging the question of fact by the standard suggested by Lawrence J., I think that the defence of contributory negligence inevitably failed. This appeal must be allowed; and as the amount of damages has not been

(1) [1934] 2 K. B. 132, 139, 140. (2) [1936] A. C. 206, 214.

determined, there must be a new trial on the question of damages only. Unless the parties otherwise agree the case will be reheard at the next Assizes for the County of Glamorgan. The appellant must have the costs so far incurred here and in the Courts below.

I am requested by my noble and learned friend Lord Thankerton to say that he agrees with the opinion which I have read.

LORD MACMILLAN. My Lords, this is an action of damages by the mother of a mine worker who met his death while at work in a colliery belonging to the respondents. Her case is that her son's death was due to the respondents' breach of their duty, under s. 55 of the Coal Mines Act, 1911, to keep securely fenced the exposed and dangerous machinery in the mine which the deceased was employed to tend.

It has to be borne in mind that the Coal Mines Act, while largely concerned with prescribing precautions to be taken for ensuring the safety of workmen in mines, does not confer any right of civil action for breach of its provisions. The statute enforces its requirements by imposing penalties of fine or imprisonment for their infringement. So far as I am aware, the only reference in the Act to civil proceedings is to be found in s. 102, sub-s. 8, which enacts that " the owner "of a mine shall not be liable to an action for damages as for "breach of statutory duty in respect of any contravention of or "non-compliance with any of the provisions of this Act if "it is shown that it was not reasonably practicable to avoid or "prevent the breach." Consequently a civil action for damages in respect of an accident to a miner alleged to be due to a breach of statutory duty on the part of his employers must, in my opinion, be based upon negligence and be subject to the general principles of law which govern actions of damages for negligence. Indeed, under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, it is not permissible to take proceedings otherwise than under that Act in respect of an accident to a workman unless the injury is alleged to have been due to the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.

In such an action as that which is now before your Lordships it is therefore incumbent on the plaintiff to prove that the defendant owed a duty to the deceased workman, that the defendant failed to fulfil that duty and that the death of the workman was attributable to that failure of duty on the part of his employers. The Coal Mines Act does, however, materially assist the plaintiff in such a case. It absolves him from proving the existence and the nature of the employers' duty, for it imposes and defines the duty. If the plaintiff can show that there has been a breach of the statute he has established the existence of negligence. It remains for him only to prove that the accident was due to that negligence. On this latter issue the defendant is entitled to avail himself of the recognized pleas open to the defendant in an action based on negligence. He can either (1.) maintain that the plaintiff's evidence has failed to show that the defendant's negligence caused the accident or (2.) prove affirmatively that the accident was caused wholly or in part by the plaintiff's own negligence.

Now in the present case the appellant starts with the advantage that the duty which the respondents owed to her deceased son is defined and prescribed by the statute and that the respondents admit that they were in breach of that duty. The only remaining questions are whether it has been sufficiently shown that the deceased's death was due to that breach of duty on the part of the respondents and whether the respondents have proved that the deceased by his own negligence caused or materially contributed to the accident which befell him.

The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty.

I do not propose to rehearse the facts of the present accident. They have been fully set out by my noble and learned friend

Lord Atkin, with whose exposition, both of the facts and of the law applicable thereto, I find myself in entire agreement. While the precise manner in which the deceased met his death remains unascertained because there was no eye-witness of the accident, it has been proved to demonstration that if it had not been for the respondents' breach of their statutory duty the accident would not have happened. The respondents' breach of duty was clearly a cause of the accident. Having thus causally connected the accident with the respondents' breach of duty, I do not think that it was incumbent on the appellant to eliminate and disprove all conjectural possibilities that the deceased may himself have been in some way careless of his own safety. From the facts established by the appellant it may be reasonably inferred that the respondents' breach of duty was a substantial cause of the accident. It is then for the respondents to show that the deceased himself was by his own negligence wholly or partly responsible for the accident. The respondents have been at pains to suggest grounds for attributing possible negligence to the deceased. These grounds have been largely conjectural. I agree with all Your Lordships that the respondents have failed, as matter of evidence, to establish any of them. They have also failed to bring themselves within the statutory defence provided by s. 102, sub-s. 8. That being so, the appellant is, in my opinion, entitled to succeed, and I concur in the motion that the appeal be allowed.

LORD WRIGHT. My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In the present case there are, I think, certain known facts which enable some inferences to be drawn. Beyond that point the method of inference stops and what is suggested is conjecture. It is not necessary to recapitulate the facts which have been fully stated by my noble and learned friend, Lord Atkin. I shall be content to state what I regard as proved by the method of inference, and reject what appears to me to be matter merely of conjecture. I take it as proved by inference that the deceased had taken off the movable plate before the accident and had not replaced it. The evidence of the man whom he relieved at the job is clear that the plate was on when he left, and there was no one else at the place between 7 A.M., when Caswell's shift began, and the time of the accident, say 9.45 A.M. It is also matter of inference that the plate was off before the accident for about six minutes after the belt began to move to load the new journey, because there is nothing to justify the inference that Caswell took off the plate after the belt began to move, and that a certain number of trams must have passed along the lines for a few minutes before the belt began to move at the side of the place where Caswell stood. These facts, I think, can be properly inferred. But there is nothing to enable the Court to infer what Caswell was doing at the time of the accident. I accept the evidence that Caswell had been told not to put his hand into the space opened by removal of the plate in order to clean the roller; indeed, it is clear that the deposit was so hard caked as to make that operation not only dangerous but useless. I accept the evidence that the belt had not been stopped for cleaning operations since Caswell's shift began. I gather from the evidence that a proper, perhaps the best, opportunity to clean was when the machine was stopped in the ten minutes or so while a journey of trams was being changed. In order to clean the roller the plate must have been removed. It is a reasonable, though perhaps not a certain, inference from the evidence that Caswell had thought it necessary to clean the roller when the machine stopped and had removed the plate to do so, but had been caught unawares with the plate off when Christopher Williams restarted the machine. I find it impossible to infer what Caswell then did. His duty was to clean the roller when necessary and to bale the water which collected in the sumps close to the machine. I infer from the position of the movable plate that at the time of the accident he was not trying to replace it. That, it seems, would have been a dangerous operation. The position in which one of the scrapers was found justifies the inference that he had been using it that morning, but not that he was using it at the time of the accident. The suggestion that he may have slipped while about to apply the scraper to the moving roll is, perhaps, no more than a possibility. The suggestion that he may have been reaching up to clear the belt of coal which threatened to obstruct it, and that his hand had been drawn into the bite is a mere conjecture, with, so far as I can see, no objective fact to give it plausibility. There is no evidence where the bucket or baler, which it is assumed there must have been for him to bale with, was found. Hence it is not safe to infer that he had slipped while baling, though that is perhaps more probable than any other reconstruction. That he did slip, for whatever reason, seems to be almost the only possible inference from the evidence as a whole.

What is clear is that the absence of the movable plate, rendering the machine unfenced, was, if not the sole cause, at least a cause and a substantial cause, to adopt in this context what was called in *Swadling* v. *Cooper* (1) the crucial question in a road accident case, " whose negligence was it that "substantially caused the injury ? " Indeed it seems to me that the absence of the fence can properly be described as the dominant, effective, or common sense cause. It is in my opinion clear that if at the material time the machine had been fenced, the man could not have been killed, or even come to any serious harm. His death was caused by the absence of fencing. Merely to slip, unless in proximity to the unfenced

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(1) [1931] A. C. 1, 11.

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machine, would have caused at most a bruising or, by very bad luck, perhaps a broken bone. The actual death was caused because the man was drawn into the open space; that is, it was caused by the want of fencing. That there was a breach of s. 55 of the Coal Mines Act, 1911, is, I think, clear. It is true that the machine was not dangerous when stationary. The danger came when it was working. The mischief came because, owing to the defective system of working, the man who started the machine was twelve yards from the machine, and started it in practice, as he did in this case, without knowing whether the guard was on or not and without any warning to the man at the turbine. Hence the respondents could not rely on s. 102, sub-s. 8, of the Act, because they could not show that it was not reasonably practicable to avoid or prevent the breach. That could have been done if the system of working had provided that the machine should not be started unless the guard was on. I think that the breach of s. 55 caused, or at least substantially caused, the death.

It follows that the onus is shifted on to the respondents to prove that the deceased man was guilty of some misconduct or negligence which would have the effect of excluding his claim if the injury had not been fatal and which would therefore exclude the claim in this action, because the appellant has not a higher right than the man would have had if not killed. I think for this purpose in this connection the same rule applies as that stated by Lord Watson in *Wakelin* v. *London and South Western Ry. Co.* (2), applicable to an ordinary plea of contributory negligence.

If the defendants' negligence or breach of duty is established as causing the death, the onus is on the defendants to establish that the plaintiff's contributory negligence was a substantial or material co-operating cause. As Lord Watson said: "the "plaintiff is not bound to prove the negative in order to entitle "her to a verdict in her favour." Here the breach of the statutory duty on the part of the respondents is established, and there is, in my opinion, no evidence justifying the inference that Caswell was guilty of any conduct such as to bar

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(1) 12 App. Cas. 41, 47.

the claim, whether or not the term contributory negligence is used. But it is necessary to consider the arguments strenuously advanced on behalf of the respondents to justify such an inference. They may, I think, be fairly summarized as follows: let it be conceded that the man was doing nothing wrong in removing the plate to clean the roller when the machine was stopped; to assume that would be the view most favourable to the man. But in that event his duty was to replace it in due time. He should have done so the moment the machine started, or if he had not time to replace it, stopped the machine for that purpose by signalling to the man in charge of the starting lever. Or still better he should have realized at an earlier stage that the new journey of trams was coming in as the trams passed him on their way to the point where each in turn would come in under the chute, and then he had ample warning to replace the plate. As he failed to do so, he was just as blameworthy as if he had taken off the plate when the machine was working, a course which if taken by him would have been negligence or misconduct sufficient to bar the claim. Such are the contentions on behalf of the respondents. The answers made on behalf of the appellant are, first, that all this is mere conjecture and does not discharge the onus which arises from the established fact of a breach of the statute by the respondents; and, secondly, that even assuming the set of circumstances which the respondents put forward as the reconstruction of the accident most favourable to the appellant's claim, the failure of the man to replace the plate was not contributory negligence or conduct such as to bar the claim even on the assumptions postulated by the respondents. It was pointed out that there was no evidence that the man had been warned what he was to do if the machine started when the plate, having been properly removed during a stoppage, was off. To stop the machine after it had started for a journey of trams was to stop the work of the colliery, and the man might hesitate to do that and decide to wait till the next stoppage. It was not his fault that the machine started without his having an opportunity to replace it, and if he kept away from the aperture he would be safe enough,

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whereas the attempt to replace the plate while the machine was in motion was obviously dangerous. It may be that, if he so thought, he was guilty of an error of judgment, but not one for which he was to be blamed in the particular emergency. Nor was he to be blamed for not taking note as the empty trams began to pass him, that the machine would be starting as soon as the first tram of the journey reached the chute. There was no evidence that he had been directed to take note of that event, or that it had been recognized as constituting a warning to replace the plate. Thus, I think the answers on behalf of the appellant may be summarized.

In my opinion the appellant is right on both points. There is, first, no sufficient evidence that Caswell was guilty of any fault, so as to displace the onus imposed on the respondents by reason of their breach of statutory duty which caused the death, and secondly, the hypotheses relied on by the respondents, if established, would not show that he was guilty of more than an error of judgment or heedlessness or inadvertence in regard to his own safety not amounting to contributory negligence or misconduct such as to displace the claim. On this latter point I adopt as an adequate criterion of what would bar the man's claim the statement of Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1) He accepted, as he was required to do by the authorities binding him, that contributory negligence was a valid defence to a claim for breach of a statutory duty such as had been committed in that case, but he proceeded to do what I think had not been done previously, i.e., to define a standard to help a jury or a judge to decide whether or not a man had been guilty of negligence in cases of this type. The principle, he said, did not demand of "a workman in a factory a "higher degree of care than an ordinary prudent workman in a "factory would show." He proceeded: "The question is then "whether the plaintiff by the exercise of that degree of care "which an ordinary prudent workman would have shown in the "circumstances could have avoided the result of the defendants' "breach of duty. I find that he could and that the proximate "cause of the accident was his own disobedience of orders. . . ."

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(1) [1934] 2 K. B. 132, 139, 140.

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I note the word "proximate" for the use of which there is support in *Swadling* v. *Cooper.* (1) He added: "in considering "whether an ordinary prudent workman would have taken "more care than the injured man, the tribunal of fact has to "take into account all the circumstances of work in a factory "and that it is not for every risky thing which a workman in a "factory may do in his familiarity with the machinery that a "plaintiff ought to be held guilty of contributory negligence." His judgment was affirmed by the Court of Appeal, but was reversed unanimously in this House on the ground that there was no evidence to justify the finding of disobedience to orders and that the decision of Lawrence J. was based on this finding, which he described as the proximate cause of the accident, and not on the fact that the man was doing a risky thing in putting his hand as he had done inside the machine. In the opinion which I delivered in *Flower's* case (2) in this House, I added, without considering whether such a plea was properly described as one of contributory negligence, some observations in explanation and support of the judge's definition of what constituted contributory negligence in such cases, which I regard as a valuable contribution to the law on this subject.

The circumstances under which men working in a mine or a factory are exposed to risk when machinery is unfenced in breach of statutory duty have general characteristics of their own. These have to be carefully considered when the question is whether a man was negligent. I think the importance of the ruling of Lawrence J. is that he drew attention to these general conditions of work and thereby gave a good practical direction and definition to help in deciding the issue of fact in any particular case. The learned judge did not mean that there are grades or degrees of negligence or that the plaintiff is not prevented from recovering by "mild" negligence but only by "gross" negligence. Generally speaking in civil cases "gross" negligence has no more effect that negligence without an opprobrious epithet. Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins.

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(1) [1931] A. C. 1.

(2) [1936] A. C. 206, 210.

What was the standard of negligence in such cases had been left somewhat vague in the decisions before *Flower's* case. (1) The word "wilful" has figured as affording some guide when applied to negligence, as by Campbell C.J. and Wightman J. in *Caswell* v. *Worth* (2), and many years later by Scrutton L.J. in *Dew* v. *United British Steamship Co.* (3); but wilful in this connection does not necessarily mean deliberate or intentional wrong-doing. In *Senior* v. *Ward* (4) Campbell C.J. held that the deceased man had been guilty of gross negligence which materially contributed to his death. In *Pringle* v. *Grosvenor* (5) the plaintiff, a woman, was employed to clean a revolving plate while in motion. It was safe on three sides, though unfenced. She was aware of the danger if she went on the other side but did so and was injured. The Court of Session held that as she did not go into danger wilfully or out of mere bravado, but was committing a mistake by inadvertence, she was entitled to recover because she could not have been injured if the defendant had performed the statutory duty to fence. It is,

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(1) [1936] A. C. 206, 210.
(2) (1856) 5 E. & B. 849.
(3) (1928) 98 L. J. (K. B.) 88.
(4) 1 E. & E. 385.
(5) 21 R. 532.

I think, clear that epithets like "wilful" or "gross" do not advance the inquiry and can well be avoided. "Wilful" is not a term of art and is often used as meaning no more than a high degree of carelessness or recklessness. It is not necessarily limited in its use to intentional or deliberate wrong-doing.

I do not attempt to ascribe to Lawrence J.'s formula the universality or literal sanctity which appertains to the provisions of a statute, but it is, in my opinion, not only a valuable guide, but is in accordance with the authorities which the learned judge considered. It also seems to me to minimize, if not to destroy, the practical importance of the question which was much debated whether the employers' defence in such cases is properly described as a plea of contributory negligence. That it is not properly so described was held by the High Court of Australia in *Bourke* v. *Butterfield and Lewis, Ld.* (1) But I find in the conclusion of the judgment of the majority of the Court delivered by Knox C.J. these words: "We think "that in English law the phrase contributory negligence is "appropriate only in an action for negligence and not in an "action founded on breach of a positive statutory duty; but if "no more is meant than that in such an action the plaintiff "may be disentitled to succeed because of his own misconduct, "we agree that that is an accurate statement of the law." A little earlier in the judgment it is said: "Whether the "conduct of an employee goes beyond mere thoughtlessness "or want of care and amounts to misconduct is in every case "a question of fact." On the facts of that case I think that according to the formula of Lawrence J. the plaintiff would have succeeded, as in fact he did under the judgment of the High Court of Australia. But Lawrence J. would have held that there was no negligence, whereas the High Court held that there was no misconduct.

I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs

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(1) 38 C. L. R. 354.

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to the category often described as that of cases of strict or absolute liability. At the same time it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman. The cause of action is sometimes described as statutory negligence and it is said that negligence is conclusively presumed. Thus in *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1), it was held that a breach of the statutory duty constituted personal negligence or wilful act of the employer within s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. I am not prepared to agree that the defence of contributory negligence should be excluded in such cases simply on the technical ground that the cause of action is not negligence in the strict sense, whereas contributory negligence presupposes original negligence. I have, however, come to the conclusion on a consideration of the English cases, that English law has accepted contributory negligence as a defence in this class of case. If the matter had been free from authority, I should, I think, have thought it simpler to hold that a workman's claim for injury caused by breach of the employer's statutory duty to fence and like duties, is only barred by blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him. This view would have been in accord with the general intention of the statute and would have avoided the technicalities which have gathered round the doctrine of contributory negligence. But that path is closed by the line of decisions in England, and if contributory negligence is properly defined, I do not feel that the distinction is for practical purposes generally other than one of words. What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is

(1) [1934] A. C. 1.

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actually doing at the cost perhaps of some inattention to his own safety. In *Dew* v. *United British Steamship Co.* (1) I question if this point of view was fully realized by Scrutton L.J., when he dissented from the view of MacKinnon J., the trial judge. The latter was of opinion, as appears from what he said to the jury, that the real effective cause of the accident was the breach of the statutory regulation, and that the man's act in slipping was not the proximate cause of the accident. Scrutton L.J. held that as the man slipped when going about his duty and thus fell into the open unfenced hatch, the slipping was negligence because he would not have slipped if he had been more careful and was a co-operating cause, and hence that the man was disentitled to recover. So far as I follow the facts, I should have thought that they did not show negligence on the part of the man even if he might have walked more warily, and further that slipping was not the proximate cause of the injury. The negligence to be contributory must also be, in Lord Campbell's words in *Senior* v. *Ward* (2), negligence " materially contributing " to the injury. The rules of contributory negligence have been mainly developed in connection with road accidents, but at least since *Davies* v. *Mann* (3), the law in discussing contributory negligence in such cases has disregarded as not materially contributing causes some acts of the plaintiff which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation of the injury and has fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated as it was in *Swadling* v. *Cooper* (4) to be what was the substantial cause. Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty.

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(1) 98 L. J. (K. B.) 88.

(2) 1 E. & E. 385.

(3) (1842) 10 M. & W. 546.

(4) [1931] A. C. 1.

I have dwelt on these legal questions out of respect to the very careful arguments of law with which Mr. Fyfe and Sir William Jowitt have assisted the House. On the footing that contributory negligence is the test, I repeat that the respondents have not discharged the onus of establishing it, and further that such evidence as there is goes to negative a case of contributory negligence, and finally that the hypothetical reconstruction of the facts propounded on behalf of the respondents, even if accepted, would not show a case of contributory negligence.

I am for allowing the appeal.

Lord Porter (read by Lord Macmillan). My Lords, the facts have already been fully set out and I need not repeat them, but some short statement of the duties of and instructions given to the deceased man is desirable. His death was caused as a result of his hand and arm being drawn in between a belt and roller which it was his duty to clean. At the time when the accident occurred the machine driving the conveyor belt was working and the guard covering the roller had been removed. It was admittedly part of his duty to take off the guard and to clean the roller set behind it. His only instructions were not to clean the roller whilst the machine was in motion.

He does not appear to have been told not to clean the roller whilst the railway trucks which had been filled by the conveyor belt were being removed and the empty journey was being drawn into position. Indeed, as the manager stated in evidence, that would have been the obvious and convenient time to use for cleaning the roller, subject to the difficulty that whilst the machine was at rest half only of the roller would be exposed and the other half could not be cleaned unless it were given a half turn by setting the engine in motion. But there

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may have been times when the half turn would be unnecessary because the removal of a lump or the cleaning of the half would effect all that was required. To have removed the guard at the time when the engine was stopped would in those circumstances have been part of the deceased man's duty and in itself no evidence of negligence.

But it is said it was in any case negligent not to have replaced the guard before the engine started again. By consent of the parties and at the request of your Lordships certain information which had not been ascertained in evidence was supplied to your Lordships' House. From this evidence it appeared that shortly before the engine was restarted the journey of trucks would be moved into position alongside the deceased man and it was said that this truck movement would give him ample warning of the restarting of the engine. But it has to be remembered that the trucks are being changed many times a day; that the young man would be busy cleaning or baling and that his attention being so distracted he might well fail to notice the approach or presence of the trucks. Their arrival and removal were constantly repeated and in no sense intended to be a warning, though to one who was not engaged on other matters they might incidentally act as such. No doubt, however, once the engine was started again the deceased man must have known that it was working, and, if engaged in cleaning the roller, ought to have ceased to do so. The respondents maintain that it was his duty thereupon not only to cease cleaning, but also to replace the cover at once, and that he was guilty of negligence or misconduct in not doing so.

I cannot take this view. The cover had to be replaced from the top and must touch or nearly touch the moving belt in the process.

If the machinery was dangerous to one working in the vicinity when unfenced, I think it was at least equally dangerous to anyone replacing the cover. Indeed, to fail to replace it may have been a prudent rather than a negligent act.

If this view be accepted, the fact that the accident did not take place until the lapse of five or six minutes after the engine was restarted can make no difference. Once the belt had begun to revolve the cover might remain off without any negligence or misconduct on the part of the workman.

As to how the accident happened I think at best only a guess is possible. Since the scrapers had been taken from the place where they had been left, and one at least was found in the water immediately below the dead man's body, it seems to be established that he must have removed the cover for the purpose of cleaning the roller. That he continued to clean the roller after the engine started is improbable. Had he been doing so the scraper would have remained inside the fixed guard, not outside. The planks on which he stood were slippery and he was baling. He may have slipped, and where a slip might carry him it is impossible to say. On the other hand it is conceivable, though not very likely, that he was attempting to brush off some of the matter adhering to the belt either inside or outside the guard and that his hand was carried on and gripped between belt and roller. In these circumstances I think the true finding is that there was a breach of statutory duty on the part of the respondents since the guard was off at a time when the machine was working; but there is nothing to show that the workman was in any way implicated in that breach of duty. He could rightfully remove the guard whilst the engine was stopped, during the time the journey of trucks was being changed, and there is no evidence that he took it off at any other time.

Nor have the respondents shown either by positive evidence or necessary implication from the facts proved that the workman was guilty of any misconduct, negligence or any wrongful act causing or contributing to his own injury. On the other hand it has not been shown by the appellant that the deceased man was not guilty of misconduct or negligence, and if such evidence be necessary she must fail.

What is the result of this finding? The respondents say that it is the duty of the appellant to show two things: (1.) that there was a breach of statutory duty; and (2.) that the breach was the cause of the accident, but admit that if these two facts be proved the onus is on them to show negligence on the part of the workman causing or contributing to the accident. They add, however, that in this as in any case, the facts as proved by the plaintiff may establish without further evidence either that the accident was not caused by the breach of duty or that the person meeting with an accident must have been guilty of negligence.

With the first contention the appellant does not quarrel. She acknowledges that she must show a breach of statutory duty and that it was at least a cause of the accident though not that it was necessarily the sole cause. She also agrees that the evidence called on her behalf might of itself establish that the respondents' fault did not cause the accident or that the deceased man was in whole or in part the cause of his own misfortune.

The principle applicable is to be found in the well known passage from Lord Watson's speech in *Wakelin* v. *London and South Western Ry. Co.* (1): "If the plaintiff's evidence were "sufficient to show that the negligence of the defendants "did materially contribute to the injury, and threw no light "upon the question of the injured party's negligence, then I "should be of opinion that, in the absence of any counter-"evidence from the defendants, it ought to be presumed "that, in point of fact, there was no such contributory "negligence. Even if the plaintiff's evidence did disclose "facts and circumstances bearing upon that question, which "were neither sufficient per se to prove such contributory "negligence, nor to cast the onus of disproving it on the "plaintiff, I should remain of the same opinion."

If for the word "negligence" of the defendants, the words "breach of statutory duty" be substituted, the opinion is exactly applicable to the facts of the present case. Undoubtedly the absence of the guard contributed to the injury which caused the death of the workman. Had the guard been in its place the accident would not have happened. On the other hand the evidence, as I have indicated, throws no light upon the deceased man's negligence nor casts the onus of disproving contributory negligence upon the appellant.

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(1) 12 App. Cas. 41, 48.

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The most that can be said on behalf of the respondents is that their employee may or may not have been guilty of some wrong-doing—there is nothing to show that he was.

This finding would entitle the appellant to succeed, but the argument on behalf of the appellant has gone further and her representatives have maintained that once it is shown that the respondents have been guilty of a breach of statutory duty and that that breach materially contributed to the accident, the respondents cannot succeed unless it be shown that the workman knowingly and wilfully incurred the risk.

For this contention they rely upon the judgment of Campbell C.J. in *Caswell* v. *Worth*. (1) The case itself is not, I think, an authority for the principle propounded. It happened that in that case there was not only a want of ordinary care, but wilful misconduct, and Campbell C.J. fastened on the fact; but he does not assert that nothing less than wilful misconduct will constitute a defence, and Coleridge J. in the same case says: "The action, however, must be subject to the rules "of common law, and one of those is, that a want of ordinary "care *or* wilful misconduct, on the part of the plaintiff is an "answer to the action." The italics are mine.

The appellant, however, gets her chief support for the proposition from the Australian case, *Bourke* v. *Butterfield and Lewis, Ld.* (2), and in particular from the judgment of Isaacs J. in that case. Undoubtedly that judgment goes some way towards upholding the principle contended for, but such a contention was, I think, unnecessary for the decision, and is not supported to its full extent by the majority of the Court, whose judgment was delivered by Knox C.J. who said (3): "But did Parliament intend to extend that protection to every "employee in every circumstance? We think not. In our "opinion it would be unreasonable to attribute to Parliament "an intention to impose upon the employer responsibility for "an injury which the employee deliberately invites, whether "by adopting the means of inflicting it, or by rejecting the means "of avoiding it, or for an injury which has happened because

(1) 5 E. & B. 849.
(2) 38 C. L. R. 354.
(3) 38 C. L. R. 360.

"the employee deliberately took an unnecessary risk, not in "the interests of the employer, but for his own purposes. "It is not easy to frame an exact formula; but it may be said "that the employer is responsible for the negligence, but not "for the misconduct, of his employee. Whether the conduct "of an employee goes beyond mere thoughtlessness or want of "care and amounts to misconduct is in every case a question "of fact."

The speech of Lord Wright in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1), is also prayed in aid of the appellant's contention; but I do not think it can be said to confirm that view. In terms the noble and learned Lord said (2): "I shall assume, though the question is reserved for decision in "this House if it should ever arise in the future, that contributory negligence, properly defined and properly established, "is a defence in this action." He then goes on to a consideration of what the proper definition of contributory negligence in such a case should be.

As against the view that contributory negligence is not a defence to a claim based on a breach of statutory duty there are a number of dicta in cases, beginning with *Britton* v. *Great Western Cotton Co.* (3), to the effect that it is. Perhaps the best known is that contained in the judgment of Vaughan Williams L.J. in *Groves* v. *Lord Wimborne.* (4) Moreover in three recent cases the Court of Appeal have decided in terms that in such a case the contributory negligence of the injured party is a defence: see *Dew* v. *United British Steamship Co.* (5); *Craze* v. *Meyer-Dumore Bottlers' Equipment Co.* (6); and *Lewis* v. *Denye.* (7)

But the question though debated has never been determined in your Lordships' House. Strictly speaking the phrase "contributory negligence" is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase "negligence

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(1) [1936] A. C. 206.
(2) Ibid. 212.
(3) L. R. 7 Ex. 130.
(4) [1898] 2 Q. B. 402, 418, 419.
(5) 98 L. J. (K. B.) 88.
(6) [1936] W. N. 217.
(7) [1939] 1 K. B. 540.

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"materially contributing to the injury" would be more accurate, but if the word "contributory" be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough and the less accurate phrase is, I think, sanctioned by long usage.

Whatever form of words be used I see no reason for differing from the numerous dicta extending over many years, or from the decision of the Court of Appeal. It was held in *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1) that a breach of statutory duty is personal negligence on the part of the employer within the meaning of that phrase in s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and it is suggested that an action founded on breach of statutory duty is an action founded on negligence. Whether this be so, or whether a breach of statutory duty be regarded as a cause of action in itself, the question is the same. Is the employer liable for all accidents caused by a breach of statutory duty, and, if not, what is the limitation? Is it a defence to prove such negligence as would constitute contributory negligence in an action founded on a breach of common law duty, or must the employer go further and show that the workman knowingly and wilfully incurred the risk? These last are the words of Campbell C.J. Knox C.J. in the Australian case speaks of "misconduct" simpliciter.

No doubt the Mines Act was intended to protect both careful and careless workmen, but neither the appellant in the present case nor the High Court in Australia were prepared to go the length of saying that no action on the part of the workman would relieve the employer, and the protection required may well be given by making the failure to fence a criminal act.

✓ I do not see why the ordinary common law rules should not apply, leaving the careless workman to his remedy under the Workmen's Compensation Acts and reserving the additional protection for breach of statutory duty to those who exercise such reasonable care as a reasonable man working in the particular mine or factory would exercise.

It is the reasonable man who is to be considered, not the particular individual, and therefore the degree of care will not vary from man to man but it will, I think, vary from mine to mine and factory to factory. The skill gained by a worker may enable him to take risks and do acts which in an unskilled man would be negligence, and on the other hand the fatiguing repetition of the same work may make a man incapable of the same care and therefore not guilty of negligence in doing or failing to do an act which a man less fatigued would do or leave undone.

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(1) [1934] A. C. 1.

The question to be determined was thus put by Lawrence J. in the Court of First Instance in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1): " The question is then whether the "plaintiff by the exercise of that degree of care which an ordinary "prudent workman would have shown in the circumstances "could have avoided the result of the defendant's breach "of duty."

With this I agree, and I doubt if the speech of Lord Wright in your Lordships' House in the same case did more than express his views as to what was the standard required in that case. The High Court in Australia in *Bourke's* case (2), may have thought that it required misconduct and not lack of the appropriate degree of care to prevent the plaintiff from succeeding. If they did, I do not agree with them.

There remains only to be considered the defence under s. 108, sub-s. 8, of the Coal Mines Act, 1911, a section which exempts the employer from liability if it is not reasonably practicable to avoid or prevent a breach of s. 55 of the Act.

In *Coltness Iron Co., Ld.* v. *Sharp* (3) it was held that s. 102, sub-s. 8, applied because it was not reasonably practicable to keep the gearing which caused the accident securely fenced during the time at which it had to be observed whilst being tested.

So I suppose in the present case it might be argued that it was not reasonably practicable to prevent the guard from being removed—indeed that it was necessary to do so in order to clean the roller. In a sense this contention is true. But though the absence of the guard is an inchoate danger whilst the engine is not in motion, it is only an actual danger when it is working. It may be impracticable to avoid removing the guard whilst the machine is motionless, but it is not impracticable that it should be fenced whilst the machine is in motion, or at any rate to ensure that the workman shall have sufficient notice of the fact that the engine is about to be used again and ample opportunity of replacing the guard. The ringing of a bell or a warning shout and in either case a reply, should be sufficient to avoid any danger; and so would instructions that the cleaning must only take place whilst the engine is stopped for that purpose, and after the necessary stop and half turn has been started again at the request of the cleaner. This failure to give adequate warning is no doubt a fault of system. But it is not fault of system of which the workman primarily complains. His complaint is that the guard was off. The employer might have excused himself by proving it impracticable to have it on, but he cannot rely upon his own want of system for that purpose. It is not the workman who wishes to rely, as a cause of action, upon the system adopted. It is the employer who desires to use it as an excuse for failing to keep the machinery guarded.

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(1) [1934] 2 K. B. 132, 139.
(2) 38 C. L. R. 354.
(3) [1938] A. C. 90.

I think then that the workman has proved a breach of statutory duty and that that breach was a cause of the accident, that the employer has proved neither that the removal of the guard was an act which the workman should not have done, nor that its absence or the accident was due in whole or in part to the negligence of the workman, much less to his misconduct.

I take the view that it would be a sufficient defence to the employer to prove that the accident was in part caused by the act of the workman in the sense that it was materially contributed to by his negligence and by negligence I mean a failure to exercise such a degree of care as an ordinary prudent workman in that mine would exercise.

But the onus of proving that defence is admittedly on the respondents and I do not think they have discharged it.

The appellant is therefore in my view entitled to recover and

I would allow the appeal and order the respondents to pay the costs in your Lordships' House and below.

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Appeal allowed, and cause remitted to the King's Bench Division for a new trial on question of damages only.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Furniss & Co., for Arthur J. Prosser, Cardiff.*

[HOUSE OF LORDS.]

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1939
Nov. 8, 9;
Dec. 13.

DOVER NAVIGATION COMPANY, LIMITED . . . . APPELLANTS;

AND

ISABELLA CRAIG . . . . RESPONDENT.

Workman's compensation—"Accident"—Seaman contracting yellow fever from mosquito bite in Senegal—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

A seaman, while serving on board the appellants' steamship, which called at West African ports, where he was specially exposed to the risk of infection from disease-bearing bacteria, contracted yellow fever and died:—

Held, that his death was due to an "accident arising out of "his employment" and in respect of which his dependant was entitled to compensation under the Workmen's Compensation Act, 1925.

Brooker v. *Borthwick & Sons* (*Australasia*), *Ld.* [1933] A. C. 669 applied. *Karemaker* v. *S.S. Corsican* (*Owners*) (1911) 4 B. W. C. C. 295, was wrongly decided.

Decision of Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The applicant claimed compensation under the Workmen's Compensation Act, 1925, as a dependant of her son, John Craig, who, she alleged, died as the result of an injury by accident arising out of and in the course of his employment as a seaman on board the appellants' steamship, the *Sea Rambler,* which in June and July, 1936, visited ports in Senegal. As a result of touching at these ports a series of illnesses due to yellow fever began among members of the crew, including the respondent's son, who died as a result of his illness. The county court judge found that Craig died of yellow fever probably accompanied by malaria, and that his illness was caused by mosquito bites. He held such an illness to be an injury resulting from accident, and to have been suffered by Craig in the course of his employment, but he felt constrained by authority to hold that the injury did not arise out of the employment, inasmuch as Craig was not more exposed to the risk of mosquito bites than other people who frequented this part of the West African coast in summer. In so deciding the judge particularly relied on the decision of the Court of Appeal in *Karemaker* v. *S.S. Corsican* (*Owners*). (1) On appeal, the Court of Appeal reversed the decision of the county court judge and held the respondent entitled to compensation.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

The company appealed.

D. P. Maxwell Fyfe K.C., *J. Harvey Robson* and *John Bassett* (for *G. S. Harvie Watt* on active service) for the appellants. The question is whether a workman who by his term of service is compelled to go to a particular part of the world where he contracts a disease which might have been incurred by any inhabitant of that area, has met with an "accident" arising out of and in the course of his employment. That question, we submit, should be answered in the negative, the risk being one of the area and not of the employment. In *Kelly* v. *Kerry County Council* (2), the Court of Appeal in Ireland held that the death of a workman, who was killed by lightning while engaged in cleaning the gullets on a road, was not occasioned by accident within the meaning of the Act. No doubt if the place and circumstances in which the workman was employed involved greater risk of being struck by lightning than would ordinarily have been the case, the accident might be said to have arisen out of and in the course of his employment: *Andrew* v. *Failsworth Industrial Society, Ld.* (3) So, too, if the workman is exposed to any special risk, as was the applicant in *Morgan* v. *S.S. Zenaida* (*Owners*). (4) In this case, however, the seaman was not exposed to any greater peril than the other persons in the particular area. In *Karemaker* v. *S.S. Corsican* (*Owners*) (1), a seaman who was at work on his ship at Halifax, N. S., sustained frostbite, was held not to have met with an "accident" within the meaning of the Act seeing that he was exposed to no greater risk than was usual in winter at Halifax, and therefore the accident, if it could be so called, did not arise out of the employment. To the same effect was the decision in *Warner* v. *Couchman*. (1) In *Thom* (*or Simpson*) v. *Sinclair* (2) a woman while working in a shed belonging to her employer was injured by the fall of a wall which was in course of erection by an adjoining proprietor, the roof of the shed collapsing and burying the woman in the wreckage. It was held that the accident arose out of her employment because it was clearly an accident. It has, however, never been held that to take a workman, as in the present case, to a particular part of the world where different climatic conditions prevail, involves the employer in liability if the workman becomes ill through being there. The cases leave untouched injury occasioned by natural causes. In *Lawrence* v. *George Matthews* (1924), *Ld.* (3), the workman's employment brought him to a spot which, owing to the existence of a tree which was blown down as he passed on his way and killed him, had a quality that resulted in danger. That case showed an accident in the real sense; something fortuitous. *Dennis* v. *A. J. White & Co.* (4)—the case of a street accident—is another instance of an accident in the ordinary meaning of the word. So, too, was *Brooker* v. *Borthwick & Sons* (*Australasia*), *Ld.* (5), where the debris of a collapsed building fell on and injured the workman. A line must be drawn between risks incidental to employment and risks incidental to life generally. Here it was the disease-causing mosquito's bite that was of vital consequence, which was not an "accident."

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(1) (1911) 4 B. W. C. C. 295.
(2) (1908) 1 B. W. C. C. 194.
(3) [1904] 2 K. B. 32.
(4) (1909) 25 Times L. R. 446.

F. A. Sellers K.C. and *J. Paul Tyrie* (for *Alexander Ross* on active service) were not called upon.

The House took time for consideration.

1939. Dec. 13. Viscount Maugham (read by Lord Thankerton). My Lords, I do not propose in the present case

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(1) [1912] A. C. 35.
(2) [1917] A. C. 127.
(3) [1929] 1 K. B. 1.
(4) [1917] A. C. 479.
(5) [1933] A. C. 669.

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to embark on the dangerous task of endeavouring to lay down any general principle which will help to solve future problems arising out of the Workmen's Compensation Act, 1925. I am content to take the facts as stated in the opinion of my noble and learned friend Lord Atkin, and to state as shortly as I can why in those circumstances I agree with the judgments of the Court of Appeal and therefore feel compelled to differ from the decision of the county court judge at South Shields.

The question is whether the death from yellow fever in the circumstances detailed by my noble and learned friend was an accident arising out of and in the course of the employment of the deceased as a seaman serving on board the steamship *Sea Rambler*. Clearly the death occurred in the course of his employment; did it also arise out of it? The authorities show, if authorities are needed on that point, that the words connote a certain degree of causal relation between the accident and the employment. It is impossible exactly to define in positive terms the degree of that causal connection; but certain negative propositions may I think be laid down. For example, we are bound, I think, to hold that the fact that the risk is common to all mankind does not prove that the accident does not arise out of the employment—*Thom* v. *Sinclair* (1); *Dennis* v. *A. J. White & Co.* (2) Nor can it be held that death or injury from the forces of nature, e.g., earthquake and lightning, is not, merely because the accident is due to the forces of nature, an accident arising out of the employment: *Brooker* v. *Thomas Borthwick & Sons (Australasia), Ld.* (3), and cases there cited. In these cases, however, it is laid down that "it has to be shown that the workman was "especially exposed by reason of his employment to the "incidence of such a force." This principle is enunciated in the *Brooker* case (4) by Lord Atkin in delivering the judgment of the Privy Council; and in my opinion there is no doubt as to its correctness, and that we are bound by it.

My Lords, it is clearly impossible to hold that all illnesses or diseases contracted by a workman in the course of his

(1) [1917] A. C. 127.
(2) [1917] A. C. 479.
(3) [1933] A. C. 669.
(4) Ibid. 676.

employment are accidents arising out of his employment. Even if the proposition were limited to cases in which modern science has discovered that the illness or disease is due to pathogenic bacteria, whether borne by air, water, animals such as rats, or insects such as lice or mosquitoes, I think that the general proposition could not be supported. But if it can be shown that the workman was especially exposed by reason of his employment to the risk of the infection by disease-bearing bacteria I see no difficulty in coming to the conclusion that illness or disease so caused is due to an accident arising out of his employment. This is no more than an application of the principle stated in the *Brooker* decision (1), to cases where pathogenic bacteria operate in a sense as forces of nature. In my opinion there is no distinction between the extent and the nature of the causal relation in the one case and the other.

My Lords, this view is sufficient for the decision on this appeal. Res ipsa loquitur. The facts themselves establish the terrible nature of the risk to which the ship's company in this case was exposed by reason of the ship's visits to Zighinchor and Dakar Roads on the West Coast of Africa in July and August, 1936. Thirteen members out of a crew of twenty-four contracted yellow fever, of whom seven died. It is impossible to doubt that the *Sea Rambler* was one of the most dangerous places in the world at the time when the officers and crew were exposed to the risk of being bitten by day-flying mosquitoes which had themselves bitten human beings suffering from yellow fever.

My Lords, I share the doubts which some of your Lordships will express as to whether the case of *Karemaker* v. *S.S. Corsican* (*Owners*) (2) was correctly decided; but I do not mean to hold that all illnesses due to extremes of heat and cold in various parts of the globe are accidents arising out of the employment. I express no opinion one way or the other on that question.

I ought to add one remark. In the case now before us it is, I think, an irrelevant circumstance that the risk in question was a danger to which all persons in the same area were also

(1) [1933] A. C. 669.

(2) (1911) 4 B. W. C. C. 295.

subjected. For me it is sufficient that the unfortunate man Craig was especially exposed by reason of his employment to the risk of yellow fever. That is, I think, evidence of a sufficient causal relation to show that the fatal illness was an accident which arose out of his employment; and it is not ad rem to show that other persons, voluntarily or otherwise, ran the same risk.

For these reasons I agree with the conclusion of the Court of Appeal; and accordingly this appeal should be dismissed with costs.

LORD ATKIN. My Lords, this is an appeal from the Court of Appeal who reversed the decision of the county court judge at South Shields, who in an application by the respondent under the Workmen's Compensation Acts made an award in favour of the employers, the present appellants. The applicant claimed as a dependant of her son, John Charlton Craig, deceased, who she alleged died as the result of an injury by accident arising out of and in the course of his employment. Craig was employed by the appellants as an able-bodied seaman on their steamship the *Sea Rambler.* In the course of June and July, 1936, the ship made two visits to ports round about Dakar, Senegal. With the first we do not now appear to be concerned. She left Dakar for Gibraltar, proceeded to the south of France, returned to Gibraltar, and thence made the voyage in connection with which this claim arises. She reached Dakar, thence went to Kaolakh, and thence to Zighinchor. She then returned to Dakar Roads, and stranded for a few hours at the mouth of the river. When refloated she left for Gibraltar on August 5. On August 14 a series of illnesses began. On the 14th one member of the crew, on the 15th another, and on the 17th four others went down with high temperatures. The captain was naturally alarmed and altered his course for Funchal, Madeira. The ship arrived there on the 18th; on the 19th three more members of the crew became ill and on the 20th two more, including the captain. On that date the man whose symptoms had become known on the 14th died. The next day the chief steward died on board ship. Between August 20 and 26, eleven members of the crew were taken to hospital, of whom five, including Craig, died and six recovered. The crew numbered about twenty-four. The judge found that Craig died of yellow fever probably accompanied by malaria, and that the illness was caused by the bites of mosquitoes which were prevalent in large quantities, especially at Zighinchor. He rightly held such an illness to be an injury resulting from accident and to have been suffered in the course of Craig's employment. He, however, felt constrained by authority to hold that the injury did not arise out of the employment on the ground that Craig was not more exposed to the risk of mosquito bite than all other people who frequent this part of the West African coast in summer. He particularly relied on the decision of the Court of Appeal in *Karemaker* v. *S.S. Corsican* (*Owners*). (1)

This decision was reversed by the Court of Appeal, Slesser, Clauson and Goddard L.JJ. The judgment of Slesser L.J., who delivered the leading judgment, so entirely accords with my own views that I find it unnecessary to deal with the matter at length. In my opinion, this particular risk of injury by accident was inherent in the nature of the employment; it was necessarily incident to the performance of the sailor's work, phrases which are to be found in the judgment of Lord Finlay in *Dennis* v. *A. J. White & Co.* (2) I do not think that the case can be distinguished from the street risk cases of which that just cited is the leading case. As in those cases, it seems irrelevant that other persons are exposed to the same risk. As was said by Lord Parmoor in *Thom* v. *Sinclair* (3), cited by Lord Finlay in *Dennis* v. *White & Co.* (2): "The "fact that the risk may be common to all mankind does not "disentitle a workman to compensation if in the particular "case it arises out of the employment." For my part I find it difficult to conceive a risk more truly arising out of the employment than the risk incurred by the seaman who is sent to work in a fever-infested place abroad. Once establish the risk is one of "accident" and the connection between the employment and the accident seems to be clearly established. It seems as irrelevant that all other residents in the locality are subject to the same risk of accident as it is that all persons using the street are subject to the same risk as the servant employed to work in the street. In this particular case, however, the servant would never be exposed to the common risks of the locality but for his employment. Unemployed the seaman would not meet the particular risk at all. I myself am inclined to think that common risk of natural forces must mean the operation of the natural forces in the degree and to the extent that they would operate in the area in which the workman could be said to be exposed to them unemployed. A seaman may be directed to serve in places abroad where the forces of nature, heat, cold, flood and tempest, cause much greater risk of injury than they do at home. In such cases I personally doubt whether the fact that persons ordinarily to be found in the locality are exposed to such risks is of any importance. They are exposed to the risk as residents in the area; he is exposed to the risk because he is required by his employment so to expose himself.

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(1) 4 B. W. C. C. 295.
(2) [1917] A. C. 479.
(3) [1917] A. C. 127, 145.

I cannot but think that a seaman ordered to serve within the Arctic Circle is exposed to the risk of cold by reason of his employment, and that it is irrelevant that eskimos or laplanders are ordinarily subject to such risks. In particular, I wish to say that in my opinion the case of *Karemaker* v. *S.S. Corsican* (*Owners*) (1), which the learned arbitrator felt bound to follow, was wrongly decided. I think it was wrong to consider only whether the risk of frostbite was usual to residents of Halifax, Nova Scotia, in December. The judge should have considered whether the seaman was only exposed to that risk by reason of his employment. But in any case seeing that the injury was brought about by handling frozen rigging the association with the employment seems to have been established conclusively. It seems difficult to distinguish between an injury to a deckhand caused by handling frozen rigging and an injury to a fireman caused by handling hot firebars. It was interesting to hear on the relation of counsel that the experienced county court judge, who decided that case at Liverpool, the late Judge Thomas, later declined to follow it, treating it as a mistaken finding of fact. So far I have followed the argument of counsel in treating the accident as resulting from the "forces of nature." I doubt whether mosquito bites could properly be classified as instances of the exercise of the forces of nature any more than snake bites, or lion bites or shark bites. They may, however, in the appropriate area possibly be said to form one of the common risks to which the public is exposed, whether employed or unemployed; and if in such an area a workman's compensation Act in similar terms to our own applies, the local tribunal might have to apply its mind to questions arising from such accidents. The present case merely decides that where a seaman is sent to such an area and exposed to such risks in the course of his employment, the injury is the result of accident arising out of his employment. I should like to add that the sentence from the judgment of the Privy Council in *Brooker* v. *Thomas Borthwick & Sons (Australasia), Ld.* (1): "In the case of such a 'community risk' as it was labelled," cited by the learned arbitrator, does not purport to convey the reasoning of the Board but merely forms part of the statement of the argument of counsel which the judgment proceeds to discuss. Taken by itself as printed at the beginning of a paragraph I can see that it might mislead, though when the context is considered I cannot think that the meaning is doubtful. For the reasons given above I am of opinion that this appeal should be dismissed.

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(1) 4 B. W. C. C. 295.

LORD RUSSELL OF KILLOWEN. My Lords, I concur, and I do not desire to add anything, except that I share the opinion that the *Karemaker* case (2) was wrongly decided.

LORD WRIGHT. My Lords, this appeal raises the constantly recurring problem under s. 1 of the Workmen's Compensation Act, 1925, whether an injury by accident which arose in the

(1) [1933] A. C. 669, 675.

(2) 4 B. W. C. C. 295.

course of the man's employment, also fulfilled the further condition that it arose out of his employment. The facts as found by the county court judge are simple and can be shortly stated. The deceased man was a seaman and the steamer on which he was employed sailed to the West Coast of Africa, and called at places where yellow fever mosquitoes were numerous, and where there was a serious danger of an infectious mosquito bite. In fact, the deceased man, along with six other members of the crew, died of yellow fever, caused by poisonous mosquito bites incurred while the vessel was on the West Coast. It was not contested that the mosquito bites and consequent death constituted an injury by accident.

It has been established by various decisions of this House that the Workmen's Compensation Act is a remedial measure, intended to give rights beyond what the Common Law gave, and that it is a practical measure expressed in non-technical language, to be construed according to the ordinary sense of mankind. Nothing could be simpler than the words "arising "out of and in the course of the employment." It is clear that there are two conditions to be fulfilled. What arises "in the course" of the employment is to be distinguished from what arises "out of the employment." The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified. I do not know that attempts to amplify the language or define the dividing line have been very illuminating, though help in deciding any particular problem may be obtained by examining actual reported cases, not generally as laying down principles of law but as showing how in particular circumstances of fact the dividing line has been drawn. It is not legitimate to seek to write into the section definitions and limitations which the Legislature have not thought fit to insert. It seems that Lord Loreburn in

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Warner v. *Couchman* (1), had something like this in mind when he referred to cases under the Act which "stated the law fairly "enough, or rather stated what was the point of view with "which a judge ought to approach cases of this kind." But Lord Loreburn manifestly did not mean that if this House has laid down a definite canon of construction, it has not to that extent stated the law.

There have indeed been many attempts which may be found in the authorities to define or describe the distinction. As was said by Lord Dunedin in *Upton* v. *Great Central Ry. Co.* (2): "the distinction between accidents which happen "to a man and are, so to speak, brought upon him by his "business, and accidents which, although a man may in one "sense be on his business, are just accidents which may happen "to everybody, is a very fine one." But the distinction may, in some cases, as to my mind it is in the present case, be clearly marked. Thus Lord Dunedin on the same page quotes Lord Kinnear as saying: "I think that a risk is "specially connected with a man's employment if it is due to "the particular place where his employment requires him to "be at the time." Lord Haldane in the same case said that the conditions necessary to enable it to be said that an accidental injury arose out of the man's employment must be "such that the accident has some sort of causal relation "with them although not necessarily an active physical "connection." Similar statements might be multiplied but it may be that they often go no further than writing out at length the simple words of the Act, and perhaps in some cases eliminating fallacious accretions which have overlaid the language of the Act in the course of judicial decisions. Thus in cases before *Thom* v. *Sinclair* (3), it seems to have been held that the necessary connection must be between the nature of the employment, that is the actual work which the man was employed to do, and the accident. But the Act says " Arising out of the employment " not out of the nature of the employment. Hence this House held in *Thom's* case (3),

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(1) [1912] A. C. 35, 37.
(2) [1924] A. C. 302, 310.
(3) [1917] A. C. 127.

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that a girl employed to work at fish curing in a building was entitled to claim compensation when she was injured through part of the building falling on her, though the collapse of the building was due to causes external to the building. The work was not inherently dangerous, but as my noble and learned friend Lord Russell of Killowen (then Russell L.J.) said in *Lawrence* v. *George Matthews* (1924), *Ld.* (1): "sufficient "causal relation or causal connection between the accident "and the employment is established if the man's employment "brought him to the particular spot where the accident "occurred, and the spot in fact turns out to be a dangerous "spot." My noble friend there used the word "spot" because in the special facts of that case the dangerous place was a "spot" or very limited area—namely, the particular place in the road where the tree which injured the man while travelling on his duty happened to fall. The risk was in a sense "necessarily" incident to the performance of the servant's work (to quote from a further passage from Lord Russell's judgment in that case) but that statement is only true if taken to refer to the way in which things in fact turned out, not to what normally happens to a traveller by road in England. Many other illustrations could be given of instances where it has been held that an accidental injury sufficiently arises out of the employment if it befalls a man simply because of the place into which he is sent or taken by his employment. Thus in *Dennis* v. *A. J. White & Co.* (2), a boy's employment required him to proceed by bicycle through the streets. He was knocked down and injured. It was nothing to the point that every one who bicycles in the street incurs a similar risk or that the risk is general and ordinary. "Where," said Lord Finlay L.C., "the accident was the result of a risk "necessarily incidental to the performance of the servant's "work, all enquiry as to the frequency or magnitude of the risk "is irrelevant."

I have referred to these important decisions as illustrating how eminent judges have approached cases of this kind. It would be futile to attempt to cite or reconcile all the decisions

(1) [1929] 1 K. B. 1, 19. (2) [1917] A. C. 479, 483.

on the construction of these words of s. 1. They are often merely decisions of fact though some seem to involve reading into the section words which are not there or ideas which are not expressed in it. Indeed in cases of this type once the actual facts are ascertained, it is for the Court to ask itself whether on those facts the accidental injury arose out of the employment. In the present case the answer to the question seems clear and inevitable. The seaman sustained the fatal injury because his employment took him to a river or a roadstead or a sandbank on which his vessel grounded on the West Coast of Africa. He was as much, though the circumstances are different, exposed by the exigencies of his employment to the risk of being bitten by the mosquitoes as Mrs. Thom was exposed to the risk of the falling building, or the boy Dennis to the risk of being run over in the street. The infliction of the bites was an accident. In essence it was the same as if the crew had been assailed by a flight of poisoned arrows aimed at the ship by a raiding party of natives. Taking the facts as they have been found, the claim to compensation appears to be unanswerable on the words of the section, or, indeed, if analogy and authority are also considered, on the decided cases.

It is sought to evade this conclusion by a series of arguments, which, with all respect, I find both artificial and unauthorized by the language of the Act. In effect, it is argued, mosquitoes are a force of nature to which everybody in the geographical area, which is here the particular region on the West Coast of Africa, is equally subject. It is a normal risk, so it is said, affecting alike natives and visiting strangers such as the crew. It is hence a normal risk of the region. The standard of normality, it is said, is that of the ordinary person in that region, so that it is irrelevant that the deceased man was brought into that area and exposed to the poisonous elements there rampant by the exigencies of his employment. On the basis of these contentions it has been submitted that before the claim can be maintained it must be shown that the deceased man was exposed in an abnormal degree to the ordinary dangers of the region which, it is said, is not shown here.

No doubt it has often been said that if a workman, while on his employment, is accidentally injured by a force of nature which is operating generally in the area where he is, he cannot recover unless he can show that his employment exposed him in a degree beyond other people then present in the area, to the injurious effects of the natural force. Thus it has been held that a man struck by lightning cannot recover compensation under the Act unless his employment placed him in a position in which he was peculiarly exposed and vulnerable. The same has been said of exposure to extremes of heat and cold which are endemic in the region. Everybody then present in the place, whether employed or not, is subject to the same heat and cold. To associate the evil consequences of the exposure causally with the employment, so that they can be said to arise out of it, there must be some special exposure consequent on the employment beyond that of the common lot of those in the place or region. And in *Brooker's* case (1), a number of men were injured in consequence of an earthquake which caused havoc over a large area in New Zealand. The New Zealand Act is for this purpose identical with the English Act. The Court of Appeal in New Zealand had rejected the claims on the ground that the risk was common to everybody in the area, and that the injuries sustained by the men were caused by a natural force which had no particular relation to their employment. The risk of the earthquake affected everybody in the neighbourhood, whether employed or not. The fact of their employment was irrelevant. Hence, it was held, though the accidents arose in the course of the employment, they did not arise out of it. The Privy Council reversed the judgment of the Court of Appeal on the ground that on the facts the injuries could be sufficiently associated with the men's employments. Thus one was killed by the collapse of the building in which he was working, so that the case was analogous to that of *Thom* (2), though the collapse was in fact due to the earthquake. Another man by reason of the earthquake shock lost his balance and fell from the top of a high sheep race where his duty had taken him. Another

(1) [1933] A. C. 669.

(2) [1917] A. C. 127.

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claimant had been sent to do some shopping and was injured by the collapse of the shop just as he left it. Thus there was in each case a special risk associated with the employment and the position was different from what it would have been if the claimant had been situated like his fellow citizens whose employment did not expose them to any peculiar risk. It could not be said that the men would equally have been injured whether employed or not. The claims were accordingly upheld, and the decision of the Court of Appeal reversed.

In the present case, I do not know that the deceased man was subject to any special or peculiar risk of being bitten beyond that of the natives. Indeed, the county court judge expressly finds that to the sailor on board ship the risk of a mosquito bite is no more a danger than to any inhabitant of a house or hut in the locality. I shall assume that his finding was justified. But it appears to me to be irrelevant. The seaman is not exposed to the risk because he is an inhabitant of the place but because he is specially taken to the dangerous place by his employment. The position of a seaman under the Act is in many ways peculiar because his employment may expose him to risks in strange climates outside the limits of this country. In that way such risks are not normal to him but are necessarily incidental to his employment. It is, in my opinion, fallacious to treat as normal to him risks which are normal to the ordinary inhabitant of the place, who is not there because of special employment like the seaman. If analogy were needed, it may be pointed out that the boy in *Dennis* v. *A. J. White & Co.* (1), only took the risks which everybody takes who bicycles in the street, but he was held entitled to compensation because he took those risks on his employer's work. Mosquito bites on the West African Coast are very unlike a street accident in an English town, but they are analogous in the respect essential for the purposes of this case, that in each case the employee met with the accident because he was sent by his employer to the place where the danger was. If anything inconsistent with this was decided in *Karemaker* v. *S.S. Corsican* (*Owners*) (2), it was, in my

(1) [1917] A. C. 479. (2) 4 B. W. C. C. 295.

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opinion, wrongly decided. As to *Warner* v. *Couchman* (1), this House decided that case purely as on a finding of fact.

It has been said that if this claim is upheld, it will have far-reaching consequences; for instance, it is said that it would follow that if a seaman who was sent on his ship to a British port, say Southampton, where influenza was rife, caught the disease, he would have a claim. But that case is so different in so many respects from the present that I do not feel called upon to discuss it. It is enough for me that in my opinion, on the facts of this case, there was an injury by accident which arose out of the employment.

I agree with the Court of Appeal and would affirm their judgment.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche.*

Solicitors for respondent: *Barnett Janner, for Winskell & Walker, South Shields.*

(1) [1912] A. C. 35.

[HOUSE OF LORDS.]

H. L. (N. I.)* JENNINGS AND ANOTHER . . . . . APPELLANTS ;

AND

KELLY . . . . RESPONDENT.

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Oct. 10, 12;
Nov. 30.

Ireland—Licensing law—New licence—Increase of twenty-five per cent. of population—Whether increase required of city or only of particular ward—Construction of proviso—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12), s. 9 (c)—Intoxicating Liquor and Licensing Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 21), s. 3, sub-s. 6 (iv.)—" Persons aggrieved "—Right of appeal.

Sect. 9, sub-s. (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, provides that: " Where, owing to an increase of "not less than twenty-five per cent. of the population according "to the last census, there is a growth or an extension of any city "or town, and the licensing authority is satisfied, after hearing "any evidence tendered to it by any resident or owner of property "in such city or town, that the restrictions in this section on "the granting of licences may be relaxed, the licensing authority "may grant a licence to any applicant notwithstanding that the "same would be otherwise forbidden by this section

"Provided that such licence shall be granted only for premises "situate in the ward or district electoral division in which such "increase in population has taken place, and in substitution for "at least two existing licences held in respect of premises situate "within the city or town (as the case may be) comprising such "ward or district electoral division."

Sect. 3 of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, so far as relevant, was as follows: "The required "increase of population shall be proved by means of a certificate "of the Minister of Home Affairs that he is satisfied that there "has been an increase of not less than twenty-five per cent. since "the census ascertained next before the passing of the Act of "1923." :—

Held, that the applicant for the grant of a licence under the section is not required to establish that there has been an increase of not less than twenty-five per cent. of the population according to the last census as regards the city or town as a whole; it is sufficient for the applicant to show that there has been such an increase of the population in the particular ward of the city or town in which the premises for which the licence is sought are situate.

Where a section of an Act of Parliament contains a proviso there is no rule that the first part, which may be described as the enacting part, is to be construed without reference to the proviso.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

The section must be construed as a whole, each portion throwing light on the rest.

The appellants, who had unsuccessfully opposed the grant of a licence by the respondent, had been ordered to pay costs.

Held, that they were "persons aggrieved," and, as such, entitled to appeal to this House.

Sevenoaks Urban District Council v. *Twynam* [1929] 2 K. B. 440 approved and applied.

Per Lord Wright. There is no rule of the House of Lords that it will refuse to entertain an appeal which goes only to costs.

Decision of the Court of Appeal of Northern Ireland [1939] N. I. 9 affirmed.

APPEAL from an order of the Court of Appeal in Northern Ireland, reported sub nom *Rex* v. *Recorder of Belfast.* (1)

The appellants were respectively a Methodist minister and retired merchant, both residing in the parish of Knockbreda, in Belfast. The respondent was a licensed victualler carrying on business in Belfast.

The respondent gave notice of his intention to apply at the General Quarter Sessions of the Peace of Belfast for a certificate entitling him to receive a licence to sell by retail on or off the premises beer and all intoxicating liquors, at 19, Creagh Road, in the parish of Knockbreda, Belfast. By this notice he stated that the application was for an ordinary licence under s. 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927. These sections are set out in the headnote.

The respondent's application came before the Recorder of Belfast, who had before him a certificate of the Minister of Home Affairs that there had been an increase of population of not less than 25 per cent. in the Ormeau ward of Belfast since the census ascertained before the passing of the Act of 1923. It was admitted by counsel for the respondent that the increase of the population of the city of Belfast since the same census was less than 25 per cent., but it was contended that under the material section the applicant was not required to prove any increase of the population of the city or town in which the premises in respect of which the licence was applied for

(1) [1939] N. I. 9.

were situate, and that it was sufficient to prove by the certificate that there had been an increase of not less than 25 per cent. in the ward in which the premises were situate.

The appellants contended that there must be shown an increase of not less than 25 per cent. of the population of Belfast, and that had not been shown.

The Recorder held himself bound by authority to decide that as there was no increase of 25 per cent. of the population in the city of Belfast, the increase in the particular ward was insufficient in law to warrant the granting of a certificate for a licence.

Thereupon the respondent applied for a writ of certiorari to have the order of the Recorder quashed as being erroneous in law, and, further, for a mandamus to rehear the respondent's application.

Brown J. having held that no rule should be granted for a writ of certiorari, the respondent appealed to the Court of Appeal, and that Court allowed the appeal (Andrews C.J. dissenting), holding that the requirements of s. 9 (*c*) of the Act of 1923 were satisfied by an increase of 25 per cent. in the population of the ward in which the premises sought to be licensed were situate, and that increase had been shown.

The appellants appealed to this House.

A. M. Sullivan, Serjeant and K.C., *T. J. Campbell K.C.*, *James McSparran* and *Cyril Nicholson* for the respondent, took the objection that the appeal was not competent inasmuch as the appellants were not parties to the proceedings and no legal right of theirs had been infringed. Before 1920, no appeal from Ireland lay in certiorari or other prerogative writ, but in that year the Government of Ireland Act was passed, by s. 49 of which an appeal from the High Court of Appeal in Ireland to this House was given " in any case where a "person is aggrieved by any decision of the High Court of "Appeal for Ireland in any proceedings by way of certiorari, "mandamus, quo warranto or prohibition." In 1922, however, a complete change was effected. By s. 6 of Sch. I. of the Irish Free State (Consequential Provisions) Act, 1922

(Session 2), the High Court of Appeal for Ireland ceased to exist and any appeal which would have lain to that tribunal from a decision of a court in Northern Ireland was to lie to the Court of Appeal in Northern Ireland. In view of that the decision of that court was intended to be final, no provision being made for a further appeal to this House.

[LORD ATKIN. I observe that the present appellants were ordered to pay costs. Does not that make them "persons "aggrieved" and as such entitled to appeal.]

No. That fact has not that effect. Further, as was pointed out in *Boulter* v. *Kent Justices* (1), where an objection is made to the grant of a licence there is no lis, no controversy inter partes, and there it was decided that quarter sessions had no power to make an order for costs against an objector. The same was said by Palles C.B. in *Rex* v. *Dublin Justices.* (2) In a licensing court, therefore, there are no persons with legal rights to have a licence granted or to have it refused, the licensing body merely acting administratively. See also *Reg.* v. *Manchester Justices* (3) and *Rex* v. *Richmond Confirming Authority.* (4)

[LORD RUSSELL OF KILLOWEN. I think there may be a good deal in these authorities to support your contention were it not for the order making the appellants pay costs.]

That order does not make them "parties aggrieved" within the meaning of the section. In *Rex* v. *Taunton Inhabitants* (5) the parties had a particular grievance of their own; so also was that the case in *Powell* v. *Birmingham Vinegar Brewery Co.* (6) In any view the majority of the Court of Appeal were right in holding that the increase of population to be taken into consideration was an increase in the population of the particular ward where the premises for which the licence was sought was situate.

H. J. Wallington K.C. and *L. C. Curran* for the appellants. With regard to the question of the competency of the appeal, we contend that we are entitled to bring the question before this House. In *Sevenoaks Urban District Council* v. *Twynam* (1) an objector to a proposal by the local authority to acquire land to provide a parking place was held to be a "person "aggrieved" and therefore entitled to appeal, although he alleged no grounds of objection personal to himself, but only such as were common to himself and the other ratepayers.

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(1) [1897] A. C. 556.
(2) [1904] 2 I. R. 75, 96.
(3) [1899] 1 Q. B. 571, 575.
(4) [1921] 1 K. B. 248, 253.
(5) (1815) 3 M. & S. 465.
(6) [1894] A. C. 8.

On the main question the legislation on this subject has been in the direction of reducing the number of licences, and it has regard first of all to the complete licensing area. In this case the question is, has the particular area grown to the required extent to warrant the grant of an additional licence or additional licences? If the words "city or town" in s. 9 of the Act of 1923 are to have any meaning, they show that the whole city or town is being treated in the first part of the section. The words cannot mean to refer to the growth of a ward in the city or town, for, conceivably, the growth of a ward may be solely attributable to migration from another ward. The words in the proviso "such increase "in population" refer back to the words "increase in "population" in the first part of the section—namely, of the city or town, and, further, we submit that that increase shall be adequately reflected in the population of the ward. If the respondent's contention is right the section should run "where owing to an increase of not less than twenty-five per "cent. of the population of any ward in any city or town." The test for deciding whether there may be relaxation of the restriction is the growth of the whole living area. *Rex* v. *Recorder of Belfast* (2) supports this view.

The House took time for consideration.

1939. Nov. 30. VISCOUNT MAUGHAM. My Lords, this is an appeal from an order of His Majesty's Court of Appeal in Northern Ireland, dated June 20, 1938. The main point involved is the question of the true construction of a section of the Intoxicating Liquor Act (Northern Ireland), 1923—

(1) [1929] 2 K. B. 440.

(2) [1938] N. I. 10.

which I shall call the Act of 1923—a matter on which there has been in Northern Ireland a considerable difference of opinion, due, I think, to the unfortunate way in which the section is drafted. There was also raised before your Lordships the question whether an appeal to this House was competent in this case, the contention of the respondent being that the appellants were not "parties aggrieved" by the decision of the Court of Appeal. The dispute relates to the granting of a licence for the sale of intoxicating liquors in the city of Belfast. The facts are not in dispute and may be shortly stated.

The appellant John Barnabas Jennings is a Methodist minister and the appellant Elijah Quincey is a retired merchant and both the appellants are inhabitants of the parish of Knockbreda in the county of the city or county borough of Belfast in Northern Ireland. The respondent James Kelly is a licensed vintner residing and carrying on business in the county of the city of Belfast. He applied under s. 9 of the Act of 1923 for a licence for certain premises in the Ormeau ward of the city or county. The application was heard by His Honour Judge Thompson, Recorder of Belfast, the licensing authority for the district. The appellants were present as objectors and by their counsel opposed the application on the ground that the conditions as to population required by the Act (which I shall state later) had not been complied with.

An increase of not less than 25 per cent. in the population of Ormeau ward was proved by the certificate of the Minister of Home Affairs for Northern Ireland, and, in addition, proof was given of a growth of the city of Belfast owing to such increase. The respondent admitted that the population of the city was according to the census 386,947 in the year 1911 (the year of the last census before the passing of the Act of 1923) and 415,151 in the year 1926—an increase of less than 25 per cent.—whereupon the Recorder stated that he was bound by the recent decision of the King's Bench Division in the *Rex (Rainey)* v. *Recorder of Belfast* (1) to hold that it was necessary to prove an increase of 25 per cent. in the population of the city. On September 10, 1938, the Recorder, after delivering a reasoned judgment, made the following order :—

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(1) [1938] N. I. 10.

"It appearing that there has been an increase of the "population since the census ascertained next before the "passing of the Licensing Act, 1923 :—

"(*a*) of less than 25 per cent. in the case of the city of "Belfast ; and

"(*b*) of more than 25 per cent. in the case of Ormeau "Ward in which the premises proposed to be licensed are "situated and such increase being insufficient in law to "warrant the granting of a certificate for a licence,

"Refuse the application on that ground."

It should be added that the Recorder in his written judgment pointed out in very clear language the difficulties to which the decision of the King's Bench Division gave rise.

The respondent then applied to the King's Bench Division for a conditional order for a writ of certiorari directed to the Recorder to remove into the King's Bench Division his orders and adjudications in the matter for the purpose of quashing the same. On March 9, 1938, this order was refused.

The respondent then appealed to the Court of Appeal of Northern Ireland seeking a conditional order to the effect above stated and on April 25, 1938, the order of the King's Bench Division was discharged and the conditional order granted. The condition included the words " unless cause be "shown to the contrary within ten days after service of this "order upon Samuel Henry Esquire, solicitor for " the appellants and on certain officials.

The conditional order so granted was in its turn discharged by the King's Bench Division on May 17, 1938. From that order there was again an appeal to the Court of Appeal, the notice of appeal being served on the solicitor for the appellants.

Upon the hearing of the appeal the Court of Appeal (Andrews L.C.J. and Best and Babington L.JJ.) made an order dated June 20, 1938, allowing the said appeal and setting aside and discharging the order of May 17, 1938, and making absolute the said conditional order of certiorari dated April 25, 1938, notwithstanding cause shown, and further ordering (inter alia) that a writ of certiorari do issue directed to the Recorder of Belfast to remove into the King's Bench Division of the High Court of Justice in Northern Ireland for the purpose of being quashed (inter alia) all and singular orders and adjudications of the Recorder made at Belfast on September 10, 1937, refusing the respondent's application for a certificate. The appellants were ordered to pay the costs to the respondent.

It is from that order that the present appeal is brought. The Lord Chief Justice dissented from Best and Babington L.JJ. and agreed with the decision of the King's Bench Division.

It will be desirable to set out in full the terms of s. 9, sub-s. (*c*) of the Act of 1923, though the whole section should be read. It is necessary to bear in mind that the section—which replaced as regards Northern Ireland with certain alterations an earlier Act of 1902 relating to all Ireland—contained a prohibition of the granting of any fresh licences in Northern Ireland except in certain specified cases. Sect. 9.—(*c*) "Where owing to an increase of not less than "twenty-five per cent. of the population according to the "last census, there is a growth or an extension of any city "or town, and the licensing authority is satisfied after hearing "any evidence tendered to it by any resident or owner of "property in such city or town that the restrictions in this "section on the granting of licences may be relaxed, the "licensing authority may grant a licence to any applicant "notwithstanding that the same would be otherwise for-"bidden by this section.

"Provided that such licence shall be granted only for "premises situate in the ward or district electoral division in "which such increase of population has taken place, and in "substitution for at least two existing licences held in respect "of premises situate within the city or town (as the case may "be) comprising such ward or district electoral division."

A question arose as to how the required increase in

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population should be proved, and accordingly by the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, it was provided as follows: Sect. 3, sub-s. 6 (iv.): "The required "increase of population shall be proved by means of a "certificate of the Minister of Home Affairs that he is satisfied "that there has been an increase of not less than 25 per cent. "since the census ascertained next before the passing of "the Act of 1923."

Two points have been argued upon the appeal. The respondent has contended that the appeal should be dismissed as incompetent on the ground that the appeal to this House can only be justified under s. 49 (*a*) (*b*) of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), made applicable to Northern Ireland by the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), First Schedule, s. 6, sub-s. 3. The appellants, it was said, must therefore show that they are "persons aggrieved" by the decision of the Court of Appeal, and it was denied that they were.

My Lords, I have found myself unable to accept this contention. Not only were the appellants persons who in the various proceedings which I have above detailed, had been treated as objectors entitled to appear and be heard in the King's Bench Division and in the Court of Appeal, but they had been ordered to pay the costs of the proceedings by the order under appeal to this House. On this point, however, I have had the advantage of reading the judgment of my noble and learned friend Lord Wright, and I observe that he has completely dealt with it and with the arguments relied on by the respondent in support of it. I entirely agree with his view of this contention, and will therefore add nothing further of my own. The appeal in my judgment is a competent appeal.

The main point is that of the true construction of s. 9, sub-s. (*c*), which I have set out above. It is clear from the words of the proviso that the licence can only be granted if there has been an increase of not less than 25 per cent. of the population of the ward (I will omit the words "or district "electoral division" for the sake of brevity) in which the application for a licence is being made. Is it also necessary that a second condition as to population should be satisfied—namely, that there must be an increase of not less than 25 per cent. in the population of the city or town ? The Court of Appeal has by a majority answered this question in the negative, and the learned Recorder showed by his written judgment that he shared this view ; but, as I have said, the Lord Chief Justice and the judges of the King's Bench Division were for answering it in the affirmative.

The section is in several respects curiously framed. It begins by requiring that there should be a growth or an extension of the city or town owing to an increase of not less than 25 per cent. of the population according to the last census. It is clear that such an increase requires a comparison between a previous and a subsequent number of the population ; but this could not be ascertained merely by the last census before the Act of 1923. This difficulty is resolved by s. 3 of the Act of 1927, which no doubt requires the Minister to make a comparison of the population ascertained at the last census before the Act of 1923 and of the existing population (presumably) at the date of the application for the licence. Plainly from the words of the proviso this certificate must apply to the increase in population of the ward ; and I repeat that the question is, must there also be a certificate as to the increase in population of the city or town ? Nor is it very easy to say what is meant by the words " a growth "or an extension of any city or town." " Extension " seems to point to an extension in area, and, if so, " growth " would appear to mean a growth in population. If this is correct, and if growth refers to an increase in population of the city or town, there would seem to be considerable force in the observation that this might have been easily expressed by saying, " Where owing to an increase of not less than 25 per "cent. of the population of any city or town according to "the last census or to its extension." Such an increase in population must obviously result in a growth (if not an extension) of the city or town. Why then provide that the growth or the extension must be due to the increase in population of the same area?

The licensing authority must also be satisfied by the evidence that the restrictions in the section on the granting of licences may be relaxed. The relaxation is indeed not of a very drastic character, since the total number of licences in the city or town will be reduced by one if the application is granted. It has been truly observed that if the city or town has increased in population since the last census by not less than a quarter, there must necessarily be one or more wards in which there has been a similar increase. There might, however, be an enormous increase in population of a ward and yet only an increase in population of the city by, say, 20 per cent. It would seem strange in a clause purporting to relax restrictions to prohibit the granting of a fresh licence in such a ward even though two licences were being given up in the rest of the city or town.

We must now come to the proviso, for there is, I think, no doubt that in the construction of the section the whole of it must be read and a consistent meaning if possible given to every part of it. The words are "provided that such licence "shall be granted only for premises situate in the ward or "district electoral division in which such increase in population "has taken place." There seems to be no doubt that the words "such increase in population" refer to the increase of not less that 25 per cent. of the population mentioned in the opening words of the section. If those words indicate an increase of not less than 25 per cent. of the population of the city or town, then the required condition is that the population of the ward, if the words are given their ordinary meaning, must have increased by not less than one quarter of the whole population of the city or town. This seems to me, as it seemed to the Lords Justices in the Court of Appeal, to reduce s. 9 almost to a nullity; yet this is the construction which, as I understand it, found favour with the King's Bench Division. I will add that if Parliament had intended so strange and improbable an event I think that very different language would have been used. The obvious way of drafting the section, if both these conditions as to population were to be requisite, would be to couple them together, e.g., by providing, "Where there has "been an increase of not less than 25 per cent. of the popu- "lation of any city or town according to the last census and "where an increase of not less than 25 per cent. of the same "population is found to have taken place in any ward," etc. Moreover, if so large an increase in the population of a ward in a city should take place, it is a little difficult to see the necessity for evidence by residents or owners to show that the granting of licences in that ward might be relaxed.

Counsel for the appellants felt the force of these considerations and preferred to contend, as they seem to have contended in the Court of Appeal, that the words "such increase" might be construed to mean "such percentage of increase" or "a "similar increase." My Lords, this material change in the language used is very difficult to justify, and I can only say that I see no warrant for so altering the words. It is easy to understand that if it is assumed as being beyond doubt that the introductory words in the section mean an increase of not less than 25 per cent. of the population of the city or town, then there would be ground for endeavouring to give an artificial meaning to the words "such increase" in the proviso in order that the section should have some practical effect; but that is an assumption which I am unable to accept. The curious phrasing of the section and the reference to the necessity for "a growth or extension" of the city or town suggest the necessity for an explanatory clause, and reading the whole section together it seems to me far easier to accept the view that the increase in population mentioned in the first lines of the section is an increase in the population of the ward as indicated in the proviso by the words "the ward " . . . . in which *such* increase in population has taken place." No violence is done to the words by such a construction; and it is not a disadvantage to find that it seems to carry out a practice which has prevailed in Northern Ireland for a good many years.

The learned Lord Chief Justice was influenced in coming to his conclusion by his view that the first part of the section was the operative portion of it, and that the proviso could not properly be used to explain the words as to increase of population in the operative part. He therefore relied on the principle of construction to be found in the case of *West Derby Union* v. *Metropolitan Life Assurance Society.* (1) The principle is thus stated by Lord Watson. "I am perfectly clear," he said, "that "if the language of the enacting part of the statute does not "contain the provisions which are said to occur in it, you cannot "derive these provisions by implication from a proviso." I am sure that none of your Lordships would desire to depart from this principle where it is applicable, namely, where the enacting part of the section is unambiguous and complete and is followed by a true proviso, that is, a qualification or an exception out of it.

In my view that is not the case here, and, as Lord Herschell pointed out in the same case: "Of course a proviso may be "used to guide you in the selection of one or other of two "possible constructions of the words to be found in the enact-"ment and show when there is doubt about its scope, when it "may reasonably admit of doubt as to its having this scope "or that, which is the proper view to take of it." My Lords, that is precisely the method of construction which in my view is applicable in the present case. I will add that the words beginning "Provided that" are, in my opinion, additional and explanatory words necessary for the purpose of giving a more definite meaning to the preceding words, that is of removing doubt as to its scope, and they might easily have been incorporated in the earlier part of the section at the risk of making it rather more cumbrous than it is. We are not dealing here with a true proviso, or at any rate not with such a proviso as this House was considering in the case cited. It cannot, I think, be disputed that in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. A number of striking examples will be found in Maxwell on the Interpretation of Statutes, 8th ed., pp. 27, 28. This principle is equally

(1) [1897] A. C. 647.

applicable in the case of different parts of a single section, and none the less that the latter part is introduced by the words "provided that" or like words. There can, I think, be no doubt that the view expressed in Kent's Commentaries on American Law (cited with approval in Maxwell, p. 140) is correct: "The true principle undoubtedly is, that the sound "interpretation and meaning of the statute, on a view of the "enacting clause, saving clause and proviso, taken and construed together, is to prevail."

My Lords, I have not thought it necessary to examine the sections of the earlier Act of 1902, because, if their construction is different from that of the Act of 1923, it is always possible, the words being different, that the later Act is intended to amend the earlier one. This is, of course, not to say that if the later Act is exactly in pari materia with the earlier one, the two statutes may not have to be taken and construed together as one system and as explanatory of each other (per Lord Mansfield in *Rex* v. *Loxdale* (1); *Goldsmiths Co.* v. *Wyatt.* (2) Nor have I placed reliance on the amending Act of 1927 in construing s. 9 of the Act of 1923; but I may observe that the draftsman of the Act of 1927 seems to have thought that a certificate as to the population of only a single area was needed, and I cannot help thinking that if the Legislature had considered that in every case there had to be two inquiries and a certificate or certificates as to two increases of population different language would have been used.

For these reasons, my Lords, I think the judgments of Best and Babington L.JJ., and I will add the doubts expressed by the learned Recorder for Belfast, were correct, and this appeal must be dismissed.

LORD ATKIN. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, notwithstanding the division of judicial opinion which has existed in Northern Ireland, I have found the answer to the question in debate

(1) (1758) 1 Burr. 447.

(2) [1907] 1 K. B. 95, 105.

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to be reasonably free from difficulty. The question is what is the true construction of s. 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, and the answer depends upon the language used in that particular provision, which should, I think, be considered as it stands, and without reference to the Licensing (Ireland) Act, 1902, or any other alleged legislative ancestor.

I do not agree with the contention of the appellants, which appears in the second reason in their case, namely, that "it is "not a right method of construction to use a proviso to control "or alter the operative effect of the words preceding it." That is frequently the very function of a proviso, namely, to include within the scope of the preceding words something which prima facie would not fall within it, or to exclude something which prima facie would so fall. Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them.

Sect. 9 (*c*) seems to me a case in which the proviso tells you expressly in what sense you are to understand the preceding words "an increase of not less than 25 per cent. of the population according to the last census." Until the proviso is read it is not clear where the increase is to take place. Must there be a 25 per cent. increase in the population of the whole city or town, or will it suffice if there is a 25 per cent. increase in the population of some defined part of the city or town? The words preceding the proviso would prima facie point to the former view. One must, however, read the whole clause before attempting to construe any portion of it; and a perusal of the proviso fixes the meaning of the words which precede it. It tells you where the increase of population has to take place, namely, in the ward or electoral division in which the premises proposed to be licensed are situate. The words "such increase "of population" admit of no doubt. They are equivalent to "the increase of population above referred to," i.e., "an increase "of not less than 25 per cent. of the population according to "the last census," and they establish that the population in question is the population of the relevant ward or electoral division.

For these reasons I agree that this appeal fails and should be dismissed with costs.

I agree, too, that in view of the facts that the present appellants or their solicitors were served with the order of April 25, 1938, and with the notice of appeal of May 20, 1938, and were ordered to pay the costs of that appeal, they were persons aggrieved by the order appealed from, and that an appeal lay to your Lordships' House.

Lord Wright. My Lords, the respondent, James Kelly, made application to His Honour Judge Thompson, Recorder of Belfast, as the licensing authority for the city of Belfast, that a new licence for certain premises in the Ormeau Ward in the city should be granted to him. The Recorder refused the grant of the licence, on the ground that he was bound to do so under a decision of the High Court of Northern Ireland, *Rex* (*Rainey*) v. *Recorder of Belfast* (1), though he indicated his personal disagreement with the reasoning of that decision. Before the Recorder the appellants appeared as objectors under 3 & 4 Will. 4, c. 68, s. 4, which gives a right to residents (inter alios) in the particular area to appear and object to the grant of a licence. The respondent then applied to the High Court for a conditional order for a writ of certiorari directed to the Recorder to remove the order into the High Court. Notice of this application was served on the appellants. This application was refused by the High Court, but granted by the Court of Appeal, which ordered that unless cause were shown to the contrary within ten days after service of the order upon the solicitor for the appellants, the police, and the clerk of the Crown and Peace for the county of Antrim, a writ of certiorari should issue to remove into the King's Bench Division the order of the Recorder for the purpose of being quashed on the ground of error in law. The appellants having filed an affidavit, appeared by counsel in opposition to the granting of the writ, before the King's

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Bench Division, which discharged the conditional order with costs to be paid by the respondent to the appellants. The respondent then appealed to the Court of Appeal before whom the appellants appeared in support of the order in their favour, and were represented by counsel. The Court of Appeal by a majority, Andrews L.C.J. dissenting, allowed the appeal, made the conditional order absolute, directed a writ of certiorari to issue to the Recorder to remove his order into the King's Bench Division for the purpose of being quashed, and ordered the appellants to pay the costs of the proceedings. The appellants appeal from this order to this House.

Before dealing with the substance of the appeal, it will be convenient first to dispose of the preliminary objection taken by the respondent, which is that the appeal is not competent. The right of appeal to this House from the Court of Appeal in Northern Ireland in proceedings by way of certiorari depends on s. 49 (*a*) (*b*) of the Government of Ireland Act, 1920, as applied to Northern Ireland under the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), First Schedule, s. 6, sub-s. 3. In effect it is thereby provided that only a "person aggrieved" by the order of the Court of Appeal in the proceedings in certiorari (inter alia) can appeal. It has been contended on various grounds that the appellants are not persons aggrieved. It is said that they have no peculiar or individual right or interest or grievance in respect of the order made by the Recorder or the order made by the Court of Appeal in the proceedings by way of certiorari, because they are merely in the position of any other residents in the city of Belfast. It is also said that so far as the order against which they are appealing orders them to pay costs, that does not constitute a grievance within the meaning of the section, that, even if it were, the only appeal which is competent is an appeal limited to the question of costs, and further that this House will not entertain an appeal solely on a question of costs. In my opinion all these objections are ill-founded. The proceedings in which the appeal is brought are the proceedings by way of certiorari, not the proceedings before the licensing authority. In these latter proceedings, there could be no appeal, as was held in England and the same rule applies in Northern Ireland, in *Boulter* v. *Kent Justices.* (1) But the question is whether the appellants were persons aggrieved under and in respect of the decision in the proceedings by way of certiorari. In order to see if they were persons so aggrieved, it is necessary to consider what their position was. The Court of Appeal, in granting the conditional order for certiorari, had directed that the order was to issue unless within ten days of service on the appellants, cause was shown to the contrary. The appellants, being duly served, appeared before the King's Bench Division and succeeded in showing cause to the contrary, and were awarded their costs. In appearing in these circumstances, they could not, in my opinion, be regarded as merely officious, quite apart from their right to object in the licensing proceedings under s. 4 of 3 & 4 Will. 4, c. 68. Notice of appeal was then served upon them through their solicitor. They appeared and were represented by counsel before the Court of Appeal. But the appeal was allowed and they were ordered to pay the costs of the proceedings and the order of the King's Bench Division awarding them costs was set aside. No objection throughout was taken to the appellants taking the steps which they did in the certiorari proceedings. It is not necessary here to decide whether the mere fact that they had a statutory right to object in the proceedings before the licensing authority would constitute them parties interested in the proceedings by way of certiorari. But they were treated throughout as competent parties in these proceedings, notices were served upon them as being proper parties, orders were made in their favour and against them. It would be strange, indeed, if in these circumstances they were debarred from seeking to have restored the order made in their favour by the King's Bench Division, or to secure a reversal of the adverse order of the Court of Appeal. It would not, I think, be right to treat the matter simply from the standpoint of costs, but even if it were so treated, I think the appellants

(1) [1897] A. C. 556.

should succeed on the preliminary objection. In my opinion the appellants were clearly aggrieved by being ordered to pay costs and their right of appeal was complete merely on this limited ground. The section, be it noted, does not expressly specify the extent or nature of the grievance required, or limit in any way the scope of the right of appeal if the party is aggrieved. But if the order as to costs constitutes a sufficient grievance, it is clear that the question as to costs could not be decided without deciding on the merits of the case, and the House could not stultify itself by an inability to give full effect to its decision if it held on the appeal that the decision of the Court of Appeal was wrong. Nor is there any rule of this House that it will not entertain an appeal which goes only to costs. In *Boulter's* case (1) the quarter sessions had ordered the appellant to pay the costs of the hearing of the appeal to quarter sessions. He had objected before the justices and the licence had been refused, but on appeal it was granted by quarter sessions, before which court he had not appeared. He applied for certiorari simply and solely in respect of the order to pay costs, and eventually, after failing in the Divisional Court and in the Court of Appeal, succeeded in this House, which held that quarter sessions had no power to order costs against Boulter.

.Though *Boulter's* case (1) depended on jurisdiction, I think it is an authority that a person ordered to pay costs in a case before licensing justices in which he is an objector, has sufficient interest to be entitled to apply for certiorari, though, as this House held in *Boulter's* case (1) he was not a party in judicio in the licensing proceedings, there being no lis or controversy inter parties, and no question of a decision for or against him. After Boulter obtained the conditional order for certiorari, and failed in the lower Courts, this House entertained his appeal, though the sole question was the validity of the order for costs. I think that decision sufficiently disposes of the arguments put forward on behalf of the respondent, that an adverse order for costs is not sufficient to constitute the appellants "persons aggrieved" under s. 49, because I think

(1) [1897] A. C. 556.

that if such an order was sufficient to justify an application for an order of certiorari, it is sufficient to justify a right of appeal under s. 49. The same authority is sufficient to dispose of the contention that this House is debarred from entertaining an appeal which simply relates to costs, though no doubt in certain cases it may in its discretion refuse to do so. But in the present appeal it is clear that if it is competent at all, it raises questions of principle of considerable difficulty and importance, on which the Courts in Northern Ireland have differed.

There is no direct authority on the words of the Act now in question and I do not find it very helpful to discuss in detail the various authorities under other Acts, in which it has been debated what is the meaning in those Acts of the words "persons aggrieved." Nor does any one of those cases deal with facts like the particular facts of the present case where the appellants appeared before the licensing authority and made an objection which they had a statutory right to make. Having succeeded in that objection they were then served by order of the Court in the certiorari proceedings, in which they at first succeeded but failed in the Court of Appeal, which refused them an order for costs and instead ordered them to pay costs. The case which is nearest in point appears to me to be *Sevenoaks Urban District Council* v. *Twynam* (1), in which a Divisional Court held that a ratepayer who had duly exercised a statutory right to object to a proposal made by the Sevenoaks Urban District Council to acquire land under the Public Health Act, 1925, had a right of appeal as a person aggrieved under that statute, though he had no personal or peculiar interest or any interest beyond what flows from the fact that he was a ratepayer and a member of the public who had given a notice of objection which he was entitled to give and had failed. I think this decision was right. The facts of the present case are stronger than those in the *Sevenoaks* case. (1)

In my opinion the preliminary objection fails, and I proceed to deal with the appeal. This involves the construction of

(1) [1929] 2 K. B. 440.

s. 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, which runs as follows: "(*c*) Where, owing to an increase "of not less than twenty-five per cent. of the population "according to the last census, there is a growth or an extension "of any city or town, and the licensing authority is satisfied, "after hearing any evidence tendered to it by any resident "or owner of property in such city or town, that the restrictions "in this section on the granting of licences may be relaxed, "the licensing authority may grant a licence to any applicant "notwithstanding that the same would be otherwise forbidden "by this section:

"Provided that such licence shall be granted only for "premises situate in the ward or district electoral division in "which such increase in population has taken place, and in "substitution for at least two existing licences held in respect "of premises situate within the city or town (as the case may "be) comprising such ward or district electoral division."

With this must be read s. 3, sub-s. 6 (iv.), of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, which is in the following terms: "(iv.) The required increase of "population shall be proved by means of a certificate of the "Minister of Home Affairs that he is satisfied that there has "been an increase of not less than twenty-five per cent. since "the census ascertained next before the passing of the Act "of 1923."

The Recorder's order stated as follows both the facts which he found and his conclusion: "It appearing that there has "been an increase of the population since the census ascertained "next before the passing of the Licensing Act, 1923 (*a*) of less "than 25 per cent. in the case of the city of Belfast, and "(*b*) of more than 25 per cent. in the case of the Ormeau Ward "in which the premises proposed to be licensed are situated, "and such increase being insufficient in law to warrant the "granting of a certificate for a licence.

"Refuse the application on that ground."

As already stated the Recorder in so finding, followed the decision of *Rainey's* case. (1)

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(1) [1938] N. I. 18.

The question therefore is whether the "increase of not less "than 25 per cent. of the population" is to be in the city or in the ward or district electoral division or in both. I agree with the opinion of Best and Babington L.JJ., which was also the opinion of the Recorder, apart from the authority of *Rainey's* case (1) that the required increase of not less than 25 per cent. in the population which is intended is an increase in the population of the ward or district electoral division. So far as concerns the city or town itself, the required condition is, in my opinion, that there should have been a growth or extension of the city or town owing to an increase of not less than 25 per cent. in population of a ward or district in which it is sought to secure the new licence. This latter condition was admittedly satisfied in the facts of the present case, and I do not further discuss it.

The difficulty which is undoubtedly involved in construing the section, and which led to the conclusion of Andrews L.C.J. and of the King's Bench Division in *Rainey's* case (1), arises from the want of precision in the first part of s. 9 (*c*), which does not define what is "the population" intended. If the section stopped before the second part which is introduced by the word "Provided" it might well have been held by way of supplying the want of definition that it was "the "population" of the city or town which was intended because nothing else was mentioned in that part of the section. The crucial matter of debate has been whether the matter can be so concluded. In my opinion, it can not. The section must be construed as a whole. The second part of the section must be taken into account (whether it is properly called a proviso or not) in order to ascertain the true effect of the first part. If that is done, it follows in my opinion that the want of precision or the ambiguity which there is in the first part, regarding the definition of "the population," is made good by the words in the second part ".the ward or district "electoral division in which such increase of population has "taken place." The words "such increase" necessarily refer back to "the increase of not less than 25 per cent. of the

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"population," and define what is left undefined in the earlier words of the section. The ambiguity is thus cleared up. I question if any doubt on the point would have arisen if the paragraph introduced by " Provided " had appeared simply as a second or supplementary sub-division of s. 9 (*c*). The first part, as it stands, is incomplete by itself because it does not state the conditions and limitations which are contemplated as applying to the relaxation of the restrictions on the granting of the licence. The second part of the section condescends to particulars and in doing so defines the precise meaning of the population in regard to which the increase is required. " Such increase in population " must refer back to something which has preceded and that can only be " such "increase " as already mentioned and this is now defined. If it merely meant any increase of not less than 25 per cent., the joint effect of the two provisions might be that the required increase must be found both in the city or town and in the ward, or it might be that the increase of 25 per cent. in the city which on this construction is referred to in the first part, would have to be found in the ward or district. Either construction would be very difficult as a matter of words. Perhaps the latter, merely as a matter of words, is less difficult, but as a matter of substance it is practically inconceivable. In Belfast there are fifteen wards. There were in the city according to the census of 1911, 386,947 inhabitants, and in 1926, 415,151 inhabitants (these being the relevant dates for comparison). It would indeed be startling if a ward which showed an increase of 25 per cent. on its own population were denied its claim to a further licence, simply because it did not show an increase in its own population amounting to 25 per cent. on the total population of the city at the 1911 census, that is, an increase of more than 96,000 inhabitants. The manifest purpose of the section, which is to prevent an increase in the number of licensed premises, while satisfying the proper requirements of growing districts, is satisfied if the relaxation of the prohibition against new licences is based on the expanding population of the ward in question. This would not increase, but in fact decrease, the number of actual licences, as two licences must be surrendered from the city or town before the grant of the new licence in the ward in which the increase has taken place.

The contrary construction favoured by Andrews L.C.J. seems to be mainly based on a technical rule said to apply to the construction of a proviso. It is said that where there is a proviso, the former part, which is described as the enacting part, must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section; the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. But in the present case, not only is the first part of the section deficient in express definition, but the second part is complementary and necessary in order to ascertain the full intention of the Legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule even in the case of a proviso in the strictest or narrowest sense. Still less, where, as here, the introduction of the second part by the word "provided" is in a strict sense inapt.

I think this construction is also in conformity with the provision in the later Act of 1927 which deals with proof of "the required increase in population," though I do not seek to construe an earlier statute by a subsequent statute. But the later Act seems to contemplate a single increase, not a double increase or two increases in population. A single increase is what in my opinion the 1923 Act requires, and indeed is in accordance with what practical common sense would think that the situation required.

I agree with the order of the Court of Appeal, which in my opinion should be affirmed, the appeal being dismissed with costs.

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VISCOUNT MAUGHAM. My Lords, I am asked by my noble and learned friend Lord Porter to say that he concurs in the opinions which have been expressed.

Appeal dismissed.

Solicitors for appellants: *Russell & Arnholz, for Samuel Henry, Belfast.*

Solicitors for respondent: *C. Grobel, Son & Co., for Joseph Donnelly, Belfast.*

WALLACE-JOHNSON . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

J. C.*
1939
Dec. 11.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Gold Coast)—Criminal law—Sedition—Newspaper article—Seditious intention—Incitement to violence not a necessary ingredient of crime of sedition—Extrinsic evidence of intention not essential—Criminal Code (Gold Coast), c. 29, *s.* 330, *sub-s.* 2 (*b*), (*e*), *sub-s.* 8 (*now s.* 326, *sub-s.* 2 (*b*), (*e*), *sub-s.* 8, *of the Criminal Code,* 1936 *Revision, c.* 9)—*Construction.*

Sub-s. 8 of s. 326 of the Criminal Code of the Gold Coast, 1936 Revision, c. 9, provides (inter alia) that " 'Seditious words' are "words expressive of a seditious intention," which, in the same sub-section is defined as an intention "to bring into hatred or "contempt or to excite disaffection against . . . . the Government of the Gold Coast as by law established."

The appellant having been charged with unlawful publishing in a newspaper a seditious writing of and concerning the Government of the Gold Coast contrary to s. 330, sub-s. 2 (*b*), of the Criminal Code of the Colony (now s. 326, sub-s. 2 (*b*), of the 1936 Revision), there was no evidence of any outbreak of violence or of any manifestation of hostility to the Government of the Colony as a result of the article :—

Held, that the words of sub-s. 8 of s. 326 are clear and unambiguous. Incitement to violence is not a necessary ingredient of the crime of sedition, and the Criminal Code nowhere requires proof from the words themselves of any intention to produce such a result. If the words complained of are themselves "expressive of a seditious intention" as defined in the section they are "seditious words," and it is not necessary for the prosecution to establish that they are of such a nature as to be likely to incite to violence.

Further, it is not necessary to produce any extrinsic evidence of intention, outside the words themselves, before seditious intention can exist. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence.

Judgment of the West African Court of Appeal (Gold Coast Session) affirmed.

APPEAL (No. 89 of 1938), by special leave, from a judgment of the West African Court of Appeal (Gold Coast Session) (December 1, 1936), dismissing an appeal by the appellant,

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* *Present:* VISCOUNT CALDECOTE L.C., LORD THANKERTON, LORD ALNESS, LORD ROMER, and SIR GEORGE RANKIN.

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Isaac Theophilus Akkunna Wallace-Johnson, from his conviction by the Supreme Court of the Gold Coast Colony at the Assizes held at Victoriaborg, Accra (October 18, 1936), on charges of (1.) unlawfully publishing a seditious writing of and concerning the Government of the Gold Coast contrary to s. 330, sub-s. 2 (*b*), of the Criminal Code of the Gold Coast Colony, c. 29 (now s. 326, sub-s. 2 (*b*), of the Criminal Code, 1936 Revision, c. 9), and (2.) unlawfully having in his possession documents containing identical seditious writing to that referred to in the first count contrary to sub-s. 2 (*e*) of s. 330 (s. 326, sub-s. 2 (*e*), of the 1936 Revision).

The appellant was found guilty by the trial judge (Petrides C.J. of the Gold Coast Colony), who sat with three assessors (two of whom were of opinion that the appellant was not guilty on both counts), and the appellant was fined 50*l.* on the first count, and, in default of payment within fourteen days, was to be imprisoned for three months. No penalty was inflicted on the second count.

An appeal to the West African Court of Appeal (Kingdon C.J. of Nigeria, Webber C.J. of Sierra Leone, and St. John Yates J. (Gold Coast)) was dismissed. The Court held that the words complained of were obviously seditious, and that under each count all the elements going to make up the offence had been duly proved.

Special leave to appeal to His Majesty in Council was granted to the appellant on July 28, 1938, when it was stated that the case was of importance as it raised a question as to the interpretation of the sedition ordinances in the Colonies.

The terms of the article complained of, the defence, and the relevant statutory provisions appear from the judgment of the Judicial Committee.

1939. Oct. 30, 31. *D. N. Pritt K.C.* and *Norman Wiggins* for the appellant. It is contended that the Criminal Code of the Gold Coast Colony enshrines the English common law as to sedition. It could not be said in the present case that the words complained of are " expressive of a seditious intention " if a seditious intention includes anything in the nature of an intention to incite to actual violence. Any intention here has to be proved like an innuendo. With regard to the words "expressive of a seditious intention," the Board is entitled, in dealing with an Ordinance which may be said to enshrine the common law, to look at that law for assistance in construing the statute. The judgment throughout in *H.M. Advocate* v. *John Grant and Others* (1) indicates that what has to be shown in order that the words may be seditious—or of seditious intent—is that the words themselves are calculated to urge the people to actual violence. "Calculated" there has no element of mental calculation, but means "such as to." The necessity for the likelihood of violence before a seditious intention can be proved is dealt with in the following English authorities: *Reg.* v. *Sullivan* (2); *Rex* v. *Burdett* (3), where it was stated that (4): To be a seditious libel it must be "calculated to incite them to acts of violence and outrage"—the words in question in the present case did not incite anybody to violence: *Reg.* v. *Collins* (5); *Rex* v. *Aldred* (6), where Coleridge J., in summing-up, said (7): "The word 'sedition' "in its ordinary natural signification denotes a tumult, an "insurrection, a popular commotion, or an uproar; it implies "violence or lawlessness in some form; . . . ."; and *Reg.* v. *O'Brien*. (8) On the necessity of proving intention there are three English cases in the appellant's favour: *Reg.* v. *Lovett* (9); *Rex* v. *Cobbett* (10); and *Rex* v. *Cobbett*. (11) It must be admitted that the foot-note at p. 93 of Russell on Crime, 9th ed., vol. i., is correct in its reference to the second *Cobbett* case. (11)

It is submitted, first, that in the Criminal Code of the Gold Coast Colony none of the six classes defining a seditious intention in sub-s. 8 of s. 326 is of seditious intent unless it carries in itself the likelihood of leading to, or inciting to,

(1) (1848) Shaw's Justiciary, 17, et seq.

(2) (1868) 11 Cox, C. C. 44, 52–3, 58–9.

(3) (1820) 4 B. & Ald. 95, 131, 137–8.

(4) Ibid. 131.

(5) (1839) 9 C. & P. 456, 461.

(6) (1909) 22 Cox, C. C. 1.

(7) Ibid. 3.

(8) (1848) 6 St. Tr. (N. S.) 571, 593.

(9) (1839) 9 C. & P. 462, 466.

(10) (1804) 29 St. Tr. 1, 49.

(11) (1831) 2 St. Tr. (N. S.) 789 col. 899.

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violence. Secondly, it is contended (*a*) that both in English common law and in the Criminal Code in question there must be some evidence of intention outside the mere words of the instrument before a seditious intention can be said to exist; and (*b*) that in the present case, when the document is read, there cannot be found in it any seditious intention at all; and therefore before the appellant can be convicted there must be some evidence of seditious intention extrinsically, and, there being none, this conviction cannot stand on any ground. It is admitted that for the purposes of this case the Ordinance must first be examined, but when that is done ambiguity and difficulty appear, and in that case the interpretation of the material words of the Code should be the same as the interpretation of similar words in the English authorities which appear to have been intended by the Colonial Legislature to be codified and crystalized in their Criminal Code. [*Bank of England* v. *Vagliano* (1) was referred to.]

Norman Wiggins followed. What the Attorney-General sought to maintain in *Reg.* v. *Burns and Others* (2) is identical with what the prosecution have tried to maintain in the present case. [Reference was also made to *Reg.* v. *Sullivan.* (3)] Even assuming that a document on its face is, in all the circumstances, a seditious document in the view of reasonable persons, it is still open to an accused to rebut that presumption by giving evidence, or by otherwise showing that he had not the intention which appears on the face of the document. When the appellant gave evidence as to what he intended by the document in this case it was relevant material which the trial judge ought to have put before the assessors and himself, but that was not in fact done.

Sir Terence J. O'Connor S.-G. and *Kenelm Preedy* for the Crown, were asked to deal with the contention for the appellant that in none of the six heads of the first part of sub-s. 8 of s. 326 is there seditious intent unless the words carry incitement to violence. If there be any such requirement of the law as is

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(1) [1891] A. C. 107, 144.
(2) (1886) 16 Cox, C. C. 355, 364.
(3) 11 Cox, C. C. 44, 52, 58.

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submitted for the appellant it must be found in the Criminal Code, and must not be sought for elsewhere unless the Code itself is ambiguous. Where in s. 326 is to be found anything to support what the appellant alleges it to be necessary to prove in order to establish the utterance of a seditious libel? The whole balance of the section is to throw on the Court the duty of testing the document complained of according to its tenor. The question is: Are the words themselves fairly capable in the minds of reasonable people of bearing a seditious intention? To determine that, one must look back at the perfectly plain definition of the words "seditious intention." There is nowhere to be found in the Code, which is what has to be applied in testing whether this was a fair and proper trial, anything which suggests that a seditious intention cannot be proved without proving that it is an intention which will result in violence. There are a number of provisions in the Code which make it dangerous to rely on any doctrines from the English common law, but even assuming that it was applicable, English common law does not afford support for the argument for the appellant.

[Counsel was not required to deal further with this point.]

On the question of intention *Emperor* v. *Satya Ranjan Singh* (1) is very apposite.

D. N. Pritt K.C. replied.

Dec. 11. The judgment of their Lordships was delivered by VISCOUNT CALDECOTE L.C. This is an appeal, by special leave, from a judgment of the West African Court of Appeal (Gold Coast Session) dismissing an appeal by the appellant against his conviction on October 13, 1936, by the Supreme Court of the Gold Coast at the Assizes held at Victoriaborg, Accra. The appellant was tried upon an information containing two counts charging him with offences against s. 330 of the Criminal Code of the Gold Coast Colony, c. 29. The first count charged the appellant with unlawfully publishing a seditious writing of and concerning the Government of the Gold Coast contrary to s. 330, sub-s. 2 (*b*), of the Criminal

(1) (1929) I. L. R. 56 C. 1085, 1089, 1104.

Code. The second count charged him with unlawfully having in his possession documents containing seditious writing of and concerning the Government of the Gold Coast contrary to s. 330, sub-s. 2 (*e*). The trial took place before the Chief Justice of the Gold Coast Colony, sitting with three assessors, on October 7, 8, 9, 10, 12 and 13, 1936. The appellant was convicted by the Chief Justice on both counts, and was sentenced to pay a fine of 50*l.* on the first count and, in default of payment within fourteen days, to be imprisoned for three months. No punishment was inflicted on the second count.

The appellant appealed to the West African Court of Appeal against his conviction. The appeal was heard on November 17 and 18, and December 1, 1936, and was then dismissed.

The appellant petitioned His Majesty in Council for special leave to appeal, and this was granted on July 28, 1938.

The writing, which was the subject-matter of the charges was part of an article signed " Effective," and published in a newspaper circulating in the Gold Coast Colony. The material words as set out in the information, together with allegations as to the meaning attributable to certain words and phrases, were as follows :—

" Personally, I believe the European has a God in whom he "believes and whom he is representing in his Churches all over "Africa. He believes in the god whose name is spelt Deceit. "He believes in the god whose law is ' Ye strong, you must "' weaken the weak. Ye " civilised " Europeans, you must "' "civilise " the " barbarous " Africans with machine guns. "' Ye " Christian " Europeans, you must " Christianise " the "' "pagan " Africans with bombs, poison gases, etc.'

" In the Colonies the Europeans believe in the god that "commands ' Ye administrators ' " (meaning to include therein the Government of the Gold Coast) " ' make sedition " ' Bill ' " (meaning to include therein the Criminal Code Amendment Ordinance No. 21 of 1934 of the Gold Coast) " ' to keep the African gagged. Make Forced Labour Bill ' " (meaning to include therein the Labour Ordinance of the Gold Coast) " ' to work the Africans as slaves. Make

"'' Deportation Ordinance ' " (meaning to include therein the Kofi Sechere Detention and Removal Ordinance No. 1 of 1936) " ' to send the Africans to exile whenever they "' dare to question your authority.'

"' Make an Ordinance to grab his money so that he cannot "' stand economically. Make Levy Bill ' " (meaning to include therein the Native Administration Ordinance No. 25 of 1936 of the Gold Coast Colony) "' to force him to pay taxes for the "' importation of unemployed Europeans to serve as Stool "' Treasurers. Send detectives to stay around the house of "' any African who is nationally conscious and who is agitating "' for national independence and if possible to round him up "' in a " criminal frame-up " ' " (meaning thereby a criminal charge in which the evidence is fabricated) " ' so that he "' could be kept behind bars ' " (meaning thereby prison).

Sect. 330 of the Criminal Code (now s. 326 of the Criminal Code, 1936 Revision) is as follows :—

Sub-sect. 2 :—

"Any person who—

"(*b*) prints or publishes by any such act as is specified in "Title 18 [of this Code] any seditious words or writing ; or

. . . .

"(*e*) being found in possession of any newspaper, book, or "document or any part thereof or extract therefrom containing "seditious words or writing, does not prove to the satisfaction "of the Court that at the time he was found in such possession "he did not know the nature of its contents ;

. . . .

"shall be liable—

"(i.) for a first offence under paragraphs (*a*), (*b*), (*c*), and "(*d*) to imprisonment for two years or to a fine not exceeding "one hundred pounds . . . .

"(ii.) for a first offence under paragraphs (*e*) and (*f*) to "imprisonment for one year or to a fine not exceeding fifty "pounds ; . . . . "

Sub-sect. 8 :—

"' A seditious intention ' is an intention—

"(1.) to bring into hatred or contempt or to excite disaffection

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"against the person of His Majesty, His heirs or successors or "the Government of the Gold Coast as by law established; or

"(2.) to bring about a change in the sovereignty of the "Gold Coast; or

"(3.) to excite His Majesty's subjects or inhabitants of the "Gold Coast to attempt to procure the alteration, otherwise "than by lawful means, of any other matter in the Gold "Coast as by law established; or

"(4.) to bring into hatred or contempt or to excite disaffection "against the administration of justice in the Gold Coast; or

"(5.) to raise discontent or disaffection amongst His Majesty's "subjects or inhabitants of the Gold Coast; or

"(6.) to promote feelings of ill-will and hostility between "different classes of the population of the Gold Coast:

"It is not a seditious intention—

"(*a*) to show that His Majesty has been misled or "mistaken in any of his measures; or

"(*b*) to point out errors or defects in the government or "constitution of the Gold Coast as by law established or in "legislation or in the administration of justice with a view "to the reformation of such errors or defects; or

"(*c*) to persuade His Majesty's subjects or inhabitants "of the Gold Coast to attempt to procure by lawful means "the alteration of any matter in the Gold Coast as by law "established other than that referred to in paragraph (2.) of "this sub-section; or

"(*d*) to point out with a view to their removal any "matters which are producing or have a tendency to "produce feelings of ill-will and enmity between different "classes of the population of the Gold Coast.

"Provided that none of the acts or things mentioned in "provisos (*a*), (*b*), (*c*) and (*d*) shall be deemed to be lawful if "they are done in such manner as to effect or be likely to "effect any of the purposes (1.) to (6.) which are declared in "this section to be a seditious intention.

"'Seditious words' are words expressive of a seditious "intention;

"'Seditious writing' includes anything intended to be "read, and any sign or visible representation which is expressive "of a seditious intention."

At the trial a plea of not guilty was entered. The appellant admitted the writing and publication of the article. His defence was that the article was not seditious, and that it was not calculated to bring the Government of the Gold Coast Colony into hatred and contempt. A great deal of evidence was called as to the application of the article to the affairs of the Colony. Notwithstanding the statements of witnesses for the defence that they did not read the article as having reference to the Gold Coast Colony, it was not really in dispute that the appellant had the Government of the Colony in view when he wrote the article, and that it referred to legislation and events generally in the Colony. There was no evidence of any outbreak of violence, or of any manifestation of hostility to the Government of the Colony as a result of the article.

The case presented by counsel for the appellant for their Lordships' consideration was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for these submissions was sought in the summing up by Cave J. in *Reg.* v. *Burns and Others* (1), quoted at length in Russell on Crime, 9th ed., vol. i., pp. 89–96. Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave J. Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some colour to this

(1) (1886) 16 Cox, C. C. 355.

suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law of sedition by Stephen J. in the Digest of Criminal Law, 7th ed., arts. 123–126, quoted with approval by Cave J. in his summing up on *Reg.* v. *Burns and Others.* (1) The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of s. 330 suggests that it was intended to contain, as far as possible, a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland.

In these circumstances, their Lordships turn to the Code, and they find nothing in the section under consideration to support the appellant's contentions. " Seditious words," in the terms of sub-s. 8, " are words expressive of a seditious "intention." By an earlier definition in the same sub-section, "' A seditious intention ' is an intention to bring into hatred "or contempt . . . . the Government of the Gold Coast as "by law established."

Their Lordships find these words clear and unambiguous. Questions will necessarily arise in every case, as in this case, as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to " bring into hatred or contempt . . . . the Government of the Gold Coast," and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-s. 8, " to point out errors or defects "in the Government . . . . of the Gold Coast." It is quite another thing to add words which are not in the Code and are not necessary to give a plain meaning to the section. Nowhere in the section is there anything to support the view that

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(1) (1886) 16 Cox, C. C. 355, 359–60.

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incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into s. 330 which would be necessary to support the appellant's argument.

The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must also fail, and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined "seditious "words" by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.

For the reasons indicated, this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)* SMITH . . . . APPELLANT;

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Oct. 13, 16, 17, 18; Dec. 4.

AND

CAMMELL, LAIRD AND COMPANY, LIMITED . . . . RESPONDENTS.

Factory—Shipbuilder's yard, including dock—Newly-built ship undergoing completion in dock—Staging in forehold erected by shipbuilder in course of his work—Insulation company employed by shipowner afterwards allowed by shipbuilder to use staging for their work—Defect in staging—Accident to workman employed by insulation company—Staging constituting a factory—Occupier of factory, whether shipbuilder or insulation company—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 82, 104, *sub-s.* 1 (*iii.*); 149, *sub-ss.* 1, 2; 151, *Sixth Schedule, Part II.* (25.)—*Shipbuilding Regulations,* 1931, *Part II.*, 11 (*b*).

The Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901, in respect of the construction and repair of ships in shipbuilding yards, provide that it shall be the duty of the occupier of the factory to comply with the Regulations, and by Part II., reg. 11 (*b*) it is provided that all staging shall be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed.

The respondents were constructing in their shipbuilding yard a vessel for shipowners, which had been launched and placed for finishing in a wet dock in that yard. For the purposes of their building operations the defendants had erected in the lower forehold of the vessel a staging, which they no longer used themselves. The shipowners employed an insulation company to do certain work in the vessel, and the respondents allowed that company to occupy and use the staging in the course of their work. Owing to a defect in the staging, the appellant, an employee of the insulation company, while engaged in their work, fell from the staging and was injured. In respect of his injuries he sued the respondents, claiming damages which he alleged were caused by their negligence and by their breach of the statutory duty cast upon them by the Regulations:—

Held, (1.) that the obligation cast upon the occupiers of a factory by the Regulation requiring that all staging should be securely constructed and maintained in such a condition as to ensure the safety of all persons employed was an absolute one;

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT AND LORD PORTER.

(2.) that in the circumstances the respondents' shipbuilding yard constituted the only "factory" within the definition of the Shipbuilding Regulations; and (3.) that the Regulation was not ultra vires because it imposed a duty upon the general occupier of the shipbuilding yard though another person might be using a particular part of it.

Decision of Court of Appeal [1938] 2 K. B. 700 reversed.

APPEAL from a decision of the Court of Appeal. (1)

Messrs. Cammell, Laird & Co. (hereinafter called "the "respondents"), were shipbuilders carrying on business in their shipbuilding yard at Birkenhead, and at the material time they were constructing for the Blue Star Line a vessel which had been launched and placed in a wet dock in their yard for finishing, the finishing work being done partly by the respondents and partly by other firms employed by the Blue Star Line, and for the purpose of part of that work a staging had been erected in the lower forehold of the vessel. Among the firms so employed by the Blue Star Line was the Cork Insulation Company, who were permitted for the purpose of their work to use the staging. That company employed F. W. Smith (hereinafter called "the appellant"), to do certain of the work they had undertaken to do, and that work was done from the staging. On November 3, 1935, owing to a defect in the staging, the appellant fell from it and sustained serious injuries, in respect whereof he sued the respondents, claiming damages, alleging that he had sustained his injuries by reason of their negligence and by their breaches of the duties imposed upon them by the Shipbuilding Regulations, 1931, Regulation II., Part II. of which requires that "A "sufficient supply of sound and substantial material shall be "available in a convenient place or places for the construction "of staging; (*b*) All staging shall be (i.) securely constructed "of sound and substantial material and shall be maintained "in such condition as to ensure the safety of all persons "employed; (ii.) be inspected at regular and frequent intervals "by a competent person."

By their defence the respondents stated (inter alia) that at the material time the vessel was in a wet basin, and they

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(1) [1938] 2 K. B. 700.

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denied that the Shipbuilding Regulations, 1931, were applicable to any work there being done in the vessel. Further, they said, that if the Regulations were applicable, they denied the allegation of breaches thereof; they also alleged that if the appellant sustained injuries or suffered damage these were solely caused, or, alternatively, contributed to, by his own negligence and/or breaches of statutory duty.

The action was tried at Liverpool Assizes by Goddard J., who held that the contract between the respondents and the Blue Star Line did not include insulating the vessel with cork, that work being done by the Cork Insulation Co. under a contract between them and the Blue Star Line; that the respondents left the staging standing in the forehold, not under any obligation to the Cork Insulation Co., but merely for the convenience of that company, and that the respondents were under no duty to that company to maintain it; that the duty imposed by the Regulations of seeing that the staging was safe was a duty cast upon the occupiers of the premises, and for the purpose of the operation in question the Cork Insulation Co. were the occupiers of the staging, or of the part of the ship where the staging was erected, upon whom therefore, the duty was cast; and consequently that the appellant had no cause of action against the respondents.

From that decision the appellant appealed to the Court of Appeal, where it was held by Greer and Clauson L.JJ. (Slesser L.J. dissenting) that the Regulations, as regards their provisions for the security of staging, did not affect s. 104 of the Factory and Workshop Act, 1901, so as, for the purposes of the case, to render the shipbuilding yard the only possible "factory," and the shipbuilders the only "occupiers" thereof, or necessarily to prevent premises forming part thereof from becoming a "factory" and the occupiers thereof the "occupiers" of a factory; that the part of the vessel in which the staging was erected constituted a "factory" within the meaning of the Act and the Regulations, the occupiers of which were not the respondents, but the Cork Insulation Co.; that the respondents were under no duty to maintain the staging, and consequently, that the appeal failed.

The appellant appealed to this House.

Hartley Shawcross K.C. and *C. N. Shawcross* for the appellant. By s. 149 and Sch. 6, Part II., of the Factory and Workshop Act, 1901, shipbuilding yards are made factories, and the duty of observing the requirements of the Regulations made under the Act is imposed upon the "occupier," an expression which can only mean in the case of a shipbuilding yard the person or company in possession of the whole yard. The respondents as such occupiers are therefore liable to the appellant, and they cannot escape liability by reason of the fact that the Cork Insulation Co. used part of the yard. The obvious policy of the Regulations is to impose liability on the "occupier" wholly irrespective of the particular person who may be in occupation of part of the premises. The respondents were none the less in "occupation" of the staging because the Cork Insulation Co. was using it at the material time. *Raine* v. *Jobson* (1) was relied upon by the respondents as illustrating what amounts to "occupation" of premises, but in that case no question arose under the Shipbuilding Regulations. With regard to the decision in *Bartell* v. *Gray & Co.* (2) that cannot, in view of later decisions of this House, be regarded as possessing any authority. When once it is conceded that the Secretary of State can designate those persons who are to be bound by the Regulations, the inquiry must be, whom has he designated? The answer must be, those in occupation of the whole shipbuilding yard. The Regulations are not limited to those constructing or repairing ships; they are applied to the shipbuilding yard, and that means in this case, the respondents.

F. A. Sellers K.C. and *Guthrie Jones* (for *Selwyn Lloyd* on war service) for the respondents. The occupation of the staging whose defects were the cause of the accident was by the Cork Insulation Co., and but for the fact that it was wanted by that company it would have been dismantled.

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(1) [1901] A. C. 404.

(2) [1902] 1 K. B. 225.

It was not required by the respondents; and its control was in the hands of the Cork Insulation Co. and not with the respondents. Who in any case is the "occupier" is always a question of fact, and in this case the facts clearly establish that the Cork Insulation Co. were the "occupiers." In *Bartell* v. *Gray & Co.* (1), a firm which had contracted to do painting work on a ship lying in dock, sent on board a workman to do this work, some of the crew remaining on board in charge on behalf of the owners. One of the firm's workmen was injured by accident, and on a claim by him for compensation it was held that the firm had the actual use and occupation of the ship within the meaning of the Workmen's Compensation Act. So in this case the Cork Insulation Co. were in occupation of the staging and that company, and not the respondents, are liable, if anyone is. In *Mackey* v. *Monks (Preston), Ld.* (2), it was said by Lord Parker of Waddington, that "the person having the actual use or occupation of a "dock, wharf, quay, or warehouse, or of any premises within "the same or forming part thereof, and the persons using any "such machinery or plant, shall be deemed to be the occupiers "of a factory." Applying that to the present case it follows that the Cork Insulation Co. were the "occupiers" of the factory. This construction gives full effect to the scheme of the Act and the Regulations.

Hartley Shawcross K.C. in reply. Throughout the Act are to be found provisions which impose absolute obligations, such as the obligation to fence machinery, see s. 10; the like obligation must apply as to the sufficiency of the staging.

The House took time for consideration.

1939. Dec. 4. VISCOUNT MAUGHAM. My Lords, this is an appeal from the judgment of the Court of Appeal affirming (by a majority) the decision of the trial judge, then Goddard J. The appellant was the plaintiff in the action. He had been employed by the Cork Insulation Co., Ld. (who were not parties to the action) as a joiner to do work in connection with the

(1) [1902] 1 K. B. 225. (2) [1918] A. C. 59, 88.

construction of certain insulation chambers in a vessel named the *Dunedin Star*, and in the course of doing that work he suffered injuries for which he claimed damages in the action against the present respondents who were the owners of the wet dock in which the work of finishing the vessel was being done. As appears from the above the action was dismissed, and the question before your Lordships is whether this result is wrong, and he ought to recover judgment for a sum of 760*l.* which the learned judge fixed as the damages which he would have awarded if he had held that the appellant was entitled to maintain his claim against the respondents.

The work of finishing the vessel in the wet dock was done partly by the respondents and partly by other independent contractors, including the Cork Insulation Co. and J. and E. Hall, Ld. Certain wooden staging had been erected by the respondents in No. 2 hold and in other parts of the ship. Before the launching, the respondents had completed their work in No. 2 hold, but they left the staging for the convenience of the insulation company and other contractors, including J. and E. Hall, Ld., the refrigerating engineers, who used the staging before the insulation company and were going to use it again after the latter had completed the insulation. The respondents, however, had a gang of men who were supervising all the staging in the ship and who made frequent examinations of all the staging. The staging had been properly constructed. It extended over the width of the hold and consisted of planks reaching eighteen inches or more beyond the inside edge of the thwarts or supports on which they rested in accordance with the Regulations made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901. The staging, as constructed, was lashed to the bearers, but the foreman of the insulation company complained that the lashing caused their men to stumble and it was removed. The result was that the planks were loose in the sense that they could be moved or pushed lengthways. One of them was in fact moved away from the support of its bearer with the result that it gave way beneath the appellant when he stepped on it and he suffered serious injury. It is the fact that a chargehand employed by the respondents had removed the lashing in question at the request of the foreman of the insulation company.

The Shipbuilding Regulations to which I have referred were directed to apply " to the construction and repair of ships "in shipbuilding yards," and these yards are defined in the Factory and Workshop Act, 1901 (Sixth Schedule, Part II. (5.)) as meaning " any premises in which any ships . . . . are made "finished or repaired." The respondents' wet dock is within these words. The Regulations provide that " it shall be "the duty of the occupier to comply with Parts I. to VIII. "of these Regulations." There is a proviso as regards ships which are being repaired in public dry dock to the effect that the person who contracts with the owner of the ship or his agent to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I. to VIII., and that it should be his duty to comply with the said parts with some special and somewhat elaborate exceptions. There is no other guide to the meaning of the word " occupier " in the Regulations. It is not in my view a sufficient guide to make it safe to rely upon it. The Regulations as to staging are contained in Part II. Some of your Lordships will state the relevant sections in full and for my purpose it will suffice to set out s. 11 (*b*) which is in these terms : " All staging "shall (i.) be securely constructed of sound and substantial "material and shall be maintained in such condition as to "ensure the safety of all persons employed ; (ii.) be inspected "at regular and frequent intervals by a competent person."

Apart from contentions which are not now relied on, the appellant based his claim on the ground that he had suffered his injuries by reason of the failure by the respondents to maintain the staging " in such condition as to ensure the "safety of all persons employed." The trial judge (Goddard J.) found the following facts : " (*a*) that the Cork Insulation "Company were independent contractors and in no sense "sub-contractors to the respondents ; (*b*) that the respondents "were under no duty contractual or otherwise to provide a "staging for the Cork Insulation Company ; (*c*) that the "staging was left by the respondents for the use of the Cork "Insulation Company's men as a matter of convenience; "(*d*) that at the time when the staging was left by the "respondents for the use of the Cork Insulation Company's "men, it was properly constructed and perfectly safe, and "although the planks of the staging extended 18 inches or "more beyond the inside edge of the bearers on which they "rested, the planks were lashed as an additional safeguard; "(*e*) that it was the Cork Insulation Co. who caused "the lashings to be removed; (*f*) that because of the removal "of the lashings one of the planks became loose and the "appellant was caused to fall; (*g*) that the fact that the "respondents' men inspected the staging from time to time "did not put the respondents under any duty to the Cork "Insulation Company to maintain the staging; (*h*) that the "Cork Insulation Company and not the respondents were the "occupiers of the staging or of the part of the ship where the "staging was, for the purpose of their work upon the "insulation chambers." On these findings, which I accept, he came to the conclusion that the duty of maintaining the staging imposed by s. 11 of the Regulations was cast at the material time not upon the respondents but upon the Cork Insulation Co.

In the Court of Appeal Greer and Clauson L.JJ. were in substance of the same opinion, and they did not agree with an argument raised for the first time before them that the respondents were responsible for compliance with the Shipbuilding Regulations simply as occupiers of the shipyard, notwithstanding that the Cork Insulation Company were in fact in actual occupation of the part of the ship where the staging in question was. Slesser L.J., however, was of a different opinion. He held that the word "occupier" in the Regulations means the occupier of the whole dock, and that, save in special circumstances which do not apply in this case, there cannot, within the contemplation of the Factory Acts, be more than one occupier for one factory.

My Lords, I have not attempted to state in any detail the judgments of the Lords Justices because they are fully reported. (1) I understand that your Lordships have formed the view that the appeal should succeed, and that leads me to make two observations. On the one hand any remarks of mine would in these circumstances have little weight, and on the other hand I am happy to note that the Factory and Workshop Act, 1901, no longer offends the eye of the lawyer in the statute book. I have read with care all the authorities bearing on the topic on which this appeal turns. No clear guide is to be found in them, and even the decisions of this House are almost impossible to reconcile. If anyone should doubt this he has only to refer to the case of *Smith* v. *Standard Steam Fishing Co.* (2), and to read the judgments of Sir Richard Henn Collins and of Sir Robert Romer. In any case I do not think that the decision of this House in *Houlder Line* v. *Griffin* (3) assists us in the present appeal. For my part I cannot think that a "factory" in the Act means a building which can only have one "occupier." I think "occupier" was intended to mean the person who runs any separate undertaking in any building and who regulates and controls the work that is done. The Act contains no definition of the word "occupier," and moreover, the draftsman seems not to have appreciated that actions for damages would lie against the person who was responsible as "occupier" for non-compliance with any of the numerous requirements of the Act. The sanctions were fines imposed on the occupier under ss. 135 to 137 with provisions for exemption in certain cases under ss. 140 to 142. With all respect to those who think otherwise it seems to me that all these sections point to the conclusion that it was the person in actual control of the undertaking called the factory who was to be subject to penalties. But for the contrary opinions of your Lordships I should have thought that s. 104, sub-s. 1, of the Act, which relates to docks, wharves, quays and warehouses, clumsily as it is worded, contains in the last four or five lines a provision that for the purpose of enforcement of all the provisions as to (amongst other things) accidents, and regulations for

(1) [1938] 2 K. B. 700.
(2) [1906] 2 K. B. 275.
(3) [1905] A. C. 220.

dangerous trades, including as I think, regulations made under s. 79, the person having the actual use or occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof . . . . is to be "deemed to be the occupier of a factory," and is therefore to be liable. The fact that the Regulations were not made under s. 104 does not persuade me that the word "occupier" in the case of a dock is intended to have a meaning other than that assigned by s. 104, sub-s. 1. I can see that the language of the section is obscure. To give only one instance, it is doubtful whether the section applies to warehouses far removed from any dock or shipping. In my opinion, however, the draftsman of the Act intended, by the words used, that any Regulations for dangerous trades made under s. 79 should have effect as if "every dock, wharf, etc.," were included in the word "factory" and as if the last four or five lines of s. 104, sub-s. 1, applied to such regulations. I must admit that the language of the section is not perfectly fitted to carry out that intention, but unless the wider construction is accepted I cannot myself see any real reason for a reference in s. 104, sub-s. 1, to "regulations for dangerous "trades." It may be noted that in s. 85 the phrase used is "if any occupier, owner or manager who is bound to observe "any regulation under this Act," etc., and that this phrase is carelessly used to mean "any regulations made under "the foregoing provisions of this Act," that is, regulations made by the Secretary of State. The correct phrase is used in ss. 82, 83, 84 and 86, and in view of this motiveless change of language it does not seem very difficult to construe the words in s. 104—"the provisions of this Act with respect to," etc., as including the regulations made under the powers conferred by the Act.

I find support for these views from a careful examination of all the sections of the Act of 1901 and also of those of the Factory and Workshop Act, 1895 (including s. 23 of that Act), bearing in mind that the later Act is mainly (though not exclusively) a consolidating Act; and for myself, I would place reliance on the cases of *Bartell* v. *Gray & Co.* (1), and *Weavings* v. *Kirk and Randall* (2), which I think were rightly decided. I should therefore have been inclined to agree with the conclusions of Goddard J. and Greer and Clauson L.JJ.; and I regret that this House should have to arrive at a conclusion which seems to me unfortunate and unjust. On the other hand, I recognize the difficulties which arise on this construction, and as your Lordships will state them it would be waste of time for me to enumerate them or, in the circumstances, to explain how I should answer them. Since your Lordships are agreed upon the point, I can place no reliance upon my view, but I have felt it my duty to indicate it.

A number of other contentions were urged by the respondents on the appeal, and in regard to those contentions I need only say that I agree with your Lordships upon all of them.

In the circumstances the appeal must be allowed with the consequences as to costs which Lord Atkin will indicate.

LORD ATKIN (read by LORD WRIGHT). My Lords, this is an appeal from an order of the Court of Appeal, who by a majority dismissed an appeal from the judgment of Goddard J., as he then was, in favour of the defendants at the trial before him at the Liverpool Spring Assizes in April, 1937. The plaintiff is a joiner and his claim is for damages for personal injuries sustained while he was working for his employers, The Cork Insulation Co., Ld., on a ship which was being built by the respondents, Cammell, Laird & Co., Ld., in their shipbuilding yard at Birkenhead. The action was founded on various causes of action involving allegations of negligence; but the only cause of action maintained in the Court of Appeal and before this House was based upon an alleged breach of a statutory duty imposed by the Shipbuilding Regulations, 1931, in respect of the construction and repair of ships in shipbuilding yards. In 1935 the respondents were engaged under contract with the Blue

(1) [1902] 1 K. B. 225. (2) [1904] 1 K. B. 213.

Star Line in building in their yard the steamship *Dunedin Star*. At the date of the accident to the plaintiff on November 6, 1935, she had already been launched and was being fitted up in the wet dock or basin in the respondents' yard. Some of the holds were to be refrigerated; the refrigerating machinery was being supplied by J. & E. Hall, Ld., under an independent contract with the Blue Star Line; the insulation was to be supplied by the plaintiff's employers, the Cork Insulation Co., Ld., a subsidiary of the Blue Star Line, also under an independent contract. For the purpose of construction the respondents had erected staging throughout the ship in the various holds. In the hold in question, No. 2 hold, they had completed their own work, but had left the staging there for the convenience of the Cork Insulation Co. and of J. & E. Hall, and had in fact lowered it to suit the Insulation Co.'s requirements so as to give them headroom for insulating the part of the deck immediately above No. 2 lower hold. The staging extended over the whole width of the hold; as altered it was at a height of about 16 feet from the tank tops below, and it consisted of planks about 21 to 22 feet in length laid fore and aft on timber bearings placed about 17 feet apart. There was thus an overhang of the planks over the bearers of at least 18 inches. As originally constructed the staging was secured by a plank placed over the platform across the bearers and lashed to the bearers. When the Cork Insulation Co. came to use it their foreman complained to the respondents that his workmen might trip over these cross-planks. They were therefore removed by the respondents' men, with the result that play was afforded to the planks to move on the bearers. The plaintiff himself was a joiner engaged in fixing tongued and grooved boards so as to form receptacles for the cork insulating material which had to be placed between them. This material was conveyed to the staging in skip baskets, 6 feet by 8 feet, with two transverse binders or bearers along the bottom. It was apparently the practice of the Insulation Co.'s labourers who dealt with the cork material to drag these skips along the staging to the required spot, with the result that from time to time the planks became displaced and lost the necessary overhang. The respondents' stagers inspected this staging together with the other staging in the other holds twice a day, and when they found a plank out of place replaced it. As Peytler, the respondents' chargehand over the staging, said, this was done practically every day. It was routine.

On the day of the accident the plaintiff was engaged with another joiner in fixing the boards for the insulation of a fore and aft beam supporting the deck. He was returning from his midday meal, had gone to the after part of the staging to pick up his tools, and was walking to his job when a plank on which he had placed his foot slipped from the bearing. He was thrown to the bottom, broke his right arm and his nose and received other injuries.

The learned judge, though he decided against the plaintiff on the question of liability, prudently assessed the damages in case the plaintiff eventually succeeded. As to the sum so awarded, 760*l.*, there is no dispute.

The question now arises whether the respondents are liable to pay this amount of damages to the plaintiff. Questions of negligence and contributory negligence were raised at the trial, but those have now disappeared, and the only question remaining is whether the plaintiff suffered his injuries by reason of a breach of statutory duty by the respondents. The duty is alleged to be imposed by "The "Shipbuilding Regulations, 1931, dated February 24, 1931, "made by the Secretary of State under s. 79 of the Factory "and Workshop Act, 1901, in respect of the construction "and repair of ships in shipbuilding yards," St. R. & O. 1931, No. 133. Sect. 79 of the Factory and Workshop Act, 1901, provides: "Where the Secretary of State is satisfied that any "manufacture, machinery, plant, process or description of "manual labour used in factories or workshops is dangerous "or injurious to health or dangerous to life or limb either "generally or in the case of women, children or any other "class of persons, he may certify that manufacture, machinery, "plant, process or description of manual labour to be "dangerous, and thereupon the Secretary of State may, subject "to the provisions of this Act, make such regulations as appear "to him to be reasonably practicable and to meet the "necessity of the case." This power only exists in reference to manufactures, etc., " used in factories or workshops." By s. 149 and the second part of the Sixth Schedule to the Act, there are included in the definition of " factories " "' shipbuilding yards,' that is to say any premises in which "any ships, boats or vessels used in navigation are made, "finished or repaired." It is true that it is a condition of a shipbuilding yard that steam, water or other mechanical power is used in aid of the manufacturing process carried on by them. Messrs. Cammell, Laird's yard complies with this condition.

It has been the practice of the Secretary of State for the time being, in making regulations under this section, to impose the duties of doing or forbearing to do the acts which he thinks it necessary to describe for the purpose of securing safety upon various persons concerned in the relevant processes, whether owners or occupiers of the factories or not. This practice was upheld by this House as intra vires in *Mackey* v. *Monks (Preston), Ld.* (1), in a case where regulations had been made in connection with the processes of loading and unloading in docks. In the present case the duties created by the Regulations are specifically imposed upon two classes only. " It shall be the duty of the occupier to comply with "Parts I. to VIII. of these Regulations " ; " It shall be the "duty of all persons employed to comply with Part IX. of "these Regulations." The obligation in question in this case comes under " Part II. Staging."

"11.—(*a*) A sufficient supply of sound and substantial "material shall be available in a convenient place or places "for the construction of staging.

"(*b*) All staging shall (i.) be securely constructed of sound "and substantial material and shall be maintained in such "condition as to ensure the safety of all persons employed, "(ii.) be inspected at regular and frequent intervals by a "competent person."

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(1) [1918] A. C. 59.

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It is relevant to mention reg. 13: "All planks forming "a rising stage at the bow end of the ship shall be "securely fastened to prevent slipping and all planks forming "other stages shall be so fastened unless they extend eighteen "inches or more beyond the inside edge of the thwart or support "on which they rest."

The two questions that arise on 11 (*b*) are: was the duty to maintain the staging in such condition as to ensure the safety of all persons employed imposed in the circumstances on Cammell, Laird & Co.; if so, was it an absolute duty?

On the first question, it appears to me that if one seeks to inquire into the meaning of the word "occupier" in the sentence stating that it is the duty of the occupier to comply with Parts I. to VIII. by asking, occupier of what, the only answer can be occupier of that which alone has been previously mentioned in the Regulations as capable of being occupied, namely, the shipbuilding yard which is the factory within which the Regulations are to operate. It is not the occupier of the "staging or that part of the ship" (Goddard J.); "such "part of the ship as was necessary for the work which the Cork Insulation Co. had to do" (Greer L.J.); "the place "where the accident occurred," "the locus where the staging "stood" (Clauson L.J.). Nor is the "occupier" the right word to describe the person controlling the work in doing which the accident happened, or the person using the machinery which gives rise to an accident, as was contended for by the respondents.

We have not got to consider here the question of separate manufacturing businesses being carried on by separate occupiers in the same building; or the case where under s. 149, sub-s. 2, with the approval of the chief inspector a part of a factory may be taken for the purposes of this Act to be a separate factory. There is nothing in the Act or Regulations which in the present case makes the hold or the staging a separate factory, and I can entertain no doubt that the duty under s. 11 (*b*) is imposed upon the occupier of the only relevant factory, the shipbuilding yard, i.e., upon Cammell, Laird & Company.

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I venture to think that some confusion has arisen in this case by introducing into its consideration the terms of s. 104. By that section certain provisions of the Act are applied to docks, including s. 79 with respect to "regulations for "dangerous trades," and for the enforcement of those provisions certain persons shall be deemed to be the occupiers of a factory. Quite apart from the fact that these notional occupiers are only treated as occupiers for the purpose of the enforcement of the provisions of the Act, nothing being said about the regulations made thereunder, it appears to me that s. 104 has nothing to do with the present case. It gives power amongst other things to make Regulations as to dangerous trades in connection with docks. The Secretary of State has made such regulations. They are the Docks Regulations, 1934, in respect of the processes of loading, unloading, moving and handling goods and the processes of loading, unloading, and coaling any ship in any dock. But s. 104 in my opinion has nothing to do with the present Regulations which are made in respect of the construction and repair of ships in shipbuilding yards: which do not depend upon the creation of a "notional" factory by s. 104: and in respect of which the terms and powers of s. 104 have not been invoked and are quite irrelevant. None of the provisions of the Act applied by s. 104 are sought to be enforced in the present case; and the definition of occupier in the section has no application. For this reason also the various cases cited in the judgments below and in the argument before us under the Workmen's Compensation Act, 1897, are of no assistance. In that Act by s. 7 the Act was only to apply to employment by undertakers in or about inter alia "a factory" and factory included any dock to which any provision of the Factory Acts was applied by the Factory Act, 1895, and "undertaker" in the case of a dock meant the occupier thereof within the meaning of the Factory Acts, 1878 to 1895. As far as I can ascertain, the only reference to a dock in the Factory Acts is in s. 104. In any case it clearly applied, and much ingenuity was exercised accordingly in seeking to apply or not to apply the benefits of the Workmen's Compensation Act to sailors or workmen in ships in dock, to which end the notional occupiers were frequently discussed. This branch of the law is now obsolete, and in any case being founded on s. 104 has no relevance to the present case. I have only to add on the present part of the case that we were invited to say that once a ship was afloat in a dock she was no longer in a shipbuilding yard. This contention would, I should suppose, startle those shipbuilders whose yards include one or more basins where they complete the work of fitting up a ship after she has been launched. It would have the astonishing result of preventing the Shipbuilding Regulations from applying at all to work done after launching. It appears to me impossible to maintain.

If then the duty is imposed upon the only occupiers of this shipbuilding yard, the respondents, is the duty so imposed an absolute one ? : or is it to be construed as limited to a duty to take reasonable care to maintain ? : or to maintain only while they are themselves using the staging ? I can see no reason for not giving the words their ordinary meaning ; indeed so far as I can see all the judges in the Courts below were of opinion that upon whomsoever the duty lay there was in fact a breach. The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well known feature of this class of legislation. It is to be found passim in such Acts as the Coal Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by Mr. Shawcross in his powerful reply, is to be found in the obligation to fence dangerous machinery which in the Act of 1901 is to be found in s. 10. It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another. It was said that to construe this clause as imposing the absolute duty on the occupier in this case leads to such an unreasonable result as to throw doubt upon such a construction. My Lords, I cannot agree. The occupiers of a shipbuilding yard as are the respondents in this case, have complete control over their yard : and can impose their own conditions upon those who enter the yard and use either their own plant or the plant of the occupiers of the yard. They can insist upon the plant being constantly maintained in a safe condition, can terminate the licence to enter the premises or use the plant in case of breach, and can take any indemnities they think fit. In this particular case the respondents constructed the staging: it appears that for the use of their own men they took the very precaution that was necessary to avoid the play of the planks by lashing them to the bearers. They could have refused the request of the Cork Co. to abolish this precaution: and when they found as they did day by day that the planks were being moved they could by simple devices, e.g., bolting the planks to the bearers, have eliminated this particular danger. I therefore see no reason for refusing to give the words what I conceive to be their plain meaning of imposing an absolute duty upon the respondents.

The only other matter that I need discuss is the point taken by Mr. Sellers in his well sustained argument that if the Regulations impose an absolute duty upon the occupier of the shipbuilding yard they are ultra vires so far as the duty extends to persons other than those who are in fact carrying on the dangerous trade or using the dangerous plant. My Lords, this sounds a strange contention to apply to provisions of the Factory Acts which again and again name the occupier as the person who has to observe the precautions specified. The point seems to me to be disposed of by the decision of this House in *Mackey* v. *Monks* (*Preston*), *Ld.* (1), where Regulations had been made under ss. 79 and 104 of the Factory Act, 1901, dealing with the processes of loading and unloading a ship. There indeed the contention was the opposite to the present, and was that the Regulations were ultra vires so far as they sought to impose duties on persons other than the occupiers. The majority of the House held that the Secretary of State had power to impose the duties on any person on whom, in the opinion of the Secretary of State, it is reasonably necessary to impose duties in order to secure the end in view. Lord Parker in his speech (2) referred to what he called the second limitation to the power of the Secretary of State, namely, the Regulations are to be such "as appear to him to be reasonably necessary and to meet "the necessity of the case." He says, "It should be observed "that, with regard to the second limitation, the Secretary of "State is constituted the sole judge, and if he has exercised a "bona fide discretion his decision is final." That statement seems to me with respect to be incontrovertible and to dispose of this point. For my part I cannot imagine a sphere in which the Courts would be less likely to interfere than in debating the competency of Regulations which the Secretary of State has made after publishing in advance his proposals and after considering objections if necessary after an inquiry and which have been submitted to Parliament without any disapproving resolution. These Regulations appear to me to be intra vires the Secretary of State.

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(1) [1918] A. C. 59.

(2) Ibid. 85.

In the result the action which was described by the trial judge as misconceived appears to have been founded upon a correct appreciation of the law: and I agree with the judgment given in the Court of Appeal by Slesser L.J. I think that the appeal should be allowed, the judgment of Goddard J. should be set aside and judgment entered for the plaintiff for 760*l.* with costs. The present appellant should have the costs of the appeal to the Court of Appeal and such costs in this House as are appropriate to a pauper's appeal.

LORD RUSSELL OF KILLOWEN. My Lords, the question which we have to answer may, I think with accuracy, be stated thus: Did the Shipbuilding Regulations, 1931, effectively impose an absolute duty on the respondents as occupiers of their shipbuilding yard, to maintain the staging in the No. 2 hold of the *Dunedin Star* in such a condition as to ensure the safety of all persons employed?

In order to answer this question it is necessary to consider and determine a number of points which were debated before us. It is, however, unnecessary to repeat the relevant facts which have already been stated by my noble and learned friend Lord Atkin.

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The point which first arises is the true construction of the words in the Regulations: "It shall be the duty of the occupier "to comply with Parts I. to VIII. of these Regulations." Who is the occupier referred to? It is said that because in the Factory and Workshop Act, 1901, the words "the occupier "of a factory" may indicate different persons in different sections, therefore the words "the occupier" in the Regulations may be given an elastic reading, and that in each particular case the relevant occupier must be sought, and that upon him alone falls the duty of complying with the relevant regulation. Or, it was argued, "the occupier" in the Regulations means the person in occupation of the particular area in which the particular manufacture or process in question is being carried on. The result on either view would, it was said, be to cast the duty of observing the Regulations in regard to the staging here in question, on the Cork Insulation Co., Ld.

I am unable to adopt either of these views. The question is not what the words "the occupier of a factory" mean in the Act, but what the words "the occupier" mean in the Regulations. Incidentally it may be observed that the word "factory" occurs nowhere in the Regulations, which deal throughout with, and only with the trade of one particular kind of factory, namely, "the construction and repair of "ships in shipbuilding yards." In my opinion "the occupier" referred to in the Regulations must prima facie refer to and mean the person who is in occupation of something which has already been mentioned and which is capable of being the subject of occupation. Only one such thing has before been mentioned, namely, "shipbuilding yards"; therefore "the "occupier" must prima facie mean the occupier of a shipbuilding yard. Accordingly I am of opinion that upon the true construction of the Regulations the duty in regard to the staging was cast upon the respondents.

It was argued, however, that the case fell within s. 104 of the Act, and that by virtue of that section the Cork Insulation Co., Ld. (having the actual use or occupation of the dock or wet basin within which the ship lay or of some premises within that dock) must be deemed to be the occupier of a factory, and was therefore "the occupier" within the meaning of the Shipbuilding Regulations, 1931. The foundation of this argument is the view that s. 104 operates to apply to the "notional factories" thereby created, the provisions of the Regulations made under s. 79 in regard to the construction and repair of ships in shipbuilding yards. In other words, to quote from the judgment of Clauson L.J. in the present case, "for the purpose of enforcement of Regulations for dangerous "trades (namely, the Shipbuilding Regulations, 1931) the "person having the actual use or occupation of a dock or of "any premises within a dock or forming part of a dock shall "be deemed to be the occupier of a factory."

My Lords, with all deference to those who hold this view, it appears to me to be based upon a misreading of s. 104. That section does not purport to apply to its "notional factories" the provisions of any Regulations. It applies to them certain "provisions of this Act," namely, (1.) the provisions of s. 17, (2.) the provisions of ss. 19 to 22, (3.) the provisions of ss. 79-86, (4.) the provisions of s. 119, and (5.) the provisions of s. 136. As regards the last sentence of s. 104, sub-s. 1, the "enforcement" which is referred to is not enforcement of Regulations but enforcement of "those provisions," i.e., the sections of the Act to which I have referred. I may give two instances of the operation of this provision as to enforcement. Under it the described person is to be deemed the occupier of a factory within s. 19, sub-s. 4, and also within s. 119, sub-s. 4. In my opinion s. 104 has no reference to the Shipbuilding Regulations, 1931, nor have those Regulations any application to notional factories constituted under s. 104. For those notional factories, Regulations, if required, can be made under s. 79, because that section is by s. 104 made applicable to them although they are not factories as defined by the Act. I understand that dock regulations have in fact been made; but this action is not brought in respect of any breach of a statutory duty thereunder, but in respect of an alleged breach of statutory duty under the Shipbuilding Regulations which as I have stated have no application to any notional factory under s. 104.

It was next argued that if upon the true construction of the Shipbuilding Regulations "the occupier" means the occupier of the shipbuilding yard, the regulation which casts upon such occupier the duty of maintaining this staging in such condition as to ensure the safety of all persons employed is ultra vires of the Secretary of State under s. 79. I had difficulty in following the exact grounds upon which this argument was based. It is, however, sufficient to say that the decision of your Lordships' House in the case of *Mackey* v. *Monks* (*Preston*), *Ld.* (1), and the speeches of Lords Finlay, Atkinson and Parker of Waddington constitute ample authority for the proposition that the Secretary of State has power under the section to impose upon the occupier of a shipyard the duty of complying with the Regulations in every part thereof.

The duty being, as I think it is, effectively cast upon the respondents, is it an absolute duty, or can they excuse themselves by saying that by competent inspection at regular and frequent intervals they have done everything possible to discharge their duty? I think the duty is an absolute one: the wording is too strong to justify the milder view. The words "All staging shall . . . . be maintained" point, in my opinion, to an absolute and not a qualified obligation.

Lastly it was said that there was no breach of the Regulation, and that if there was a breach no damage flowed from it. These contentions do not seem to have been argued below; indeed Clauson L.J. in his judgment treats the breach as admitted. If, as I think it was, the duty was absolute there was a clear breach; and if there was a breach I can see no intervening agency which would justify the view that the damage sustained by the appellant did not flow from that breach.

For these reasons I would answer the question which I formulated, in the affirmative, and I would allow this appeal.

LORD WRIGHT. My Lords, Goddard J. and the majority of the Court of Appeal (Slesser L.J. dissenting) decided against the appellant who was plaintiff in the action, on the ground that the claim was brought against the wrong defendants. The Cork Insulation Co., Ld., who were the appellant's employers were, it was held, the parties who should have been sued. The Cork Co. moreover were not only the injured man's employers but were executing the particular work in the course of which the accident occurred and were doing so as independent contractors under contract with the building owner and were in actual use of the staging from which he fell. On these grounds it was held by the Courts below that the Cork Co. and not the respondents were occupiers of the particular hold or staging or part of the vessel, which in the view of the Courts below was to be regarded as a separate factory. Slesser L.J., in dissenting, held that the premises of the respondents, in a part of which the vessel was being constructed or finished, constituted a single shipbuilding yard, of which the respondents were the occupiers within the meaning of the Factory Act and the Shipbuilding Regulations, 1931, and, that being so, the respondents were, without more, responsible to the appellant for the damage he sustained owing to a breach of the Regulations occurring within the Shipbuilding premises.

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I agree with the conclusion reached by Slesser L.J. The liabilities imposed by the Factory Act, are imposed directly as a penal measure and derivatively as a civil cause of action in favour of an injured workman to whom by construction of the common law the statutory provisions create a duty, being intended to secure the health and safety of the workpeople. They are absolute and do not depend on negligence. They are in most cases imposed on the "occupier" of the factory or workshop, whether or not he is actually in fault, though in some events he may either have a right over against an actual wrongdoer or a right of exoneration. This may appear somewhat out of the course of the common law, but the statute is remedial. It is for the protection of workpeople, and that object can best, perhaps can only, be secured by fixing liability on a single person and by defining the obligation in absolute and mandatory terms. In the present case the particular liability relied upon is not based directly on the provisions of the Act, but on the provisions of the Shipbuilding Regulations, 1931, made under s. 79 of the Act. It has been contended indeed, though not very strenuously, that these Regulations are ultra vires if, or because, they fix liability on the respondents who were not the man's employers and were not actually carrying out the process in the course of which the breach occurred. It was said that such a provision could not advance the object of securing the men's safety because this, it is said, must depend on the conduct of those who are actually executing the work and could not be promoted by imposing a vicarious liability on other persons. There are many possible answers to this argument which seems to involve a misconception of the effect of the Act, both in point of law and in point of practical convenience. It is, however, I think, enough here to say that this House in *Mackey* v. *Monks* (*Preston*), *Ld.* (1), held that Regulations made like the Shipbuilding Regulations, 1931, under s. 79 could not be held ultra vires if within the limits of the Act. Within those limits the Secretary of State is given an absolute discretion to issue Regulations which prescribe what, in his opinion, is proper and necessary in order to secure the objects intended. It was said in that case, as here, that the Regulations imposed liability on the wrong person. That contention was rejected by this House. It would indeed be strange if a Court of law could question the expediency or fairness of Regulations which have been issued by the Secretary of State after the elaborate procedure required by ss. 80 and 81 of the Act, and after they have been submitted to both Houses of Parliament under s. 84. I reject it here and hold that the Shipbuilding Regulations are valid. The arguments based on s. 104 to which I refer later do not go to the validity, but to the construction of the Regulations.

The Regulations prescribe that it shall be the duty of the "occupier" to comply with Parts I. to VIII.

The breach complained of was a breach of reg. 11 (*b*) which provides that all staging shall be securely constructed of sound and substantial material and shall be maintained in

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such condition as to ensure the safety of all persons employed. I think it is clear (as all the judges below seem to have taken to be established) that the staging in the present case did not comply with the Regulation. It had got loose, so that the appellant fell through into the bottom of the hold and was injured in consequence. It is true there was no breach of reg. 13. But that does not excuse the actual and unquestionable breach of reg. 11 (*b*) relied on. A failure to comply with reg. 11 (*b*) cannot in my opinion be excused on the ground that there was no failure to comply with reg. 13. Reg. 13 is of more limited scope. It does not follow that the staging is properly maintained simply because it is not obligatory to fasten the planks. The question then is, not whose neglect caused the breach, but who was the occupier, since it is the occupier on whom is placed the obligation to comply with the Regulations. As the duty is absolute he has failed to fulfil it if for any reason the staging was not maintained, that is, continuously maintained, in such condition as to ensure the safety of all persons employed.

There are then two main questions: (1.) what were the premises which in the application of the Regulations to the circumstances of this case constituted the factory and (2.) who were the occupiers of these premises.

The accident occurred in No. 2 lower hold of the vessel, which, subject to liens for instalments paid on account of the price, was the property of the respondents. The property in the vessel did not pass until its completion and delivery. The respondents had erected the staging some time previously for the purpose of building the deck above, but when that work was completed had left the staging in order to give the use of it to the Cork Insulation Co., who were building the wooden casing between which and the fabric of the vessel the insulating material was to be placed. The appellant was a joiner engaged on that piece of construction work, employed by the Cork Co., who were constructing the insulation under contract with the shipowners. Though the Cork Co. had in this way the use of the staging with the consent of the respondents, the respondents still continued to inspect the staging twice a day. It was said that they did so as matter of routine. If it were necessary, however, I should be prepared to hold on the evidence that they still retained sufficient control over the staging in order to see that the Regulations were complied with. But I do not think it necessary to decide that, because in my opinion neither the staging, nor No. 2 lower hold, nor the work of constructing the insulation constituted a separate factory. The shipbuilding yard of the respondents was the one and only factory within the definition contained in the Sixth Schedule, Part II. (25.) of the Act. The respondents' yard included all the premises within its perimeter, including the fitting out basin or wet dock in which the vessel was lying for purposes of being completed. The work of fitting out a vessel after she is launched is often more lengthy and elaborate than the actual construction of the hull. It can only in practice be done at a wet basin or fitting-out quay after the vessel is afloat, and hence such a basin or wharf is an essential and integral portion of the shipbuilding yard. The vessel itself is not a part of the factory, but is the chattel or article which the shipbuilders are constructing. It would be an anomalous position if each and every one of the numerous special contractors, exercising special trades in the finishing and equipment of the vessel, were to be deemed to be occupiers of separate factories, each in its own limited compartment of the vessel, unless it had been specially provided by the Act or Regulations, but it was not. If it is said that it is hard that the respondents should be held liable for the breach due to an independent contractor's operations, the answer is that the respondents can impose any control and supervision which they think proper as a condition of the independent contractor being permitted to do the work. But however that may be, I think the principle of unity of responsibility is clearly established apart from specific exceptions, in the Shipbuilding Regulations of 1931. The "occupier" on whom the duties under Parts I. to VIII. are imposed is not defined. But it is, I think, clear that what is meant is the occupier of the yard as a whole, who are, in this case, the respondents. This is confirmed by the specific exception of the person who contracts to repair a vessel in a public dry dock. Such person is "deemed" to be the "occupier," as contrasted with the person having the general management and control of the dock, and there are express provisions that certain duties should rest on that person just as certain other duties are imposed also on the shipowners. It is thus manifest that special provisions are needed to shift the responsibility from the owner or letter of the dock who would be the occupier of the dock if it were not a public dry dock. Apart from that provision, it is, I think, clear that though the Regulations do not define the occupier any more than does the Act, they contemplate one single occupier of the whole shipyard. Thus, e.g., reg. 45 requires the appointment of a supervisor or supervisors to enforce the observance of the Regulations and secure the safe conduct of the work generally, and this can only refer to the premises as a unit. Similarly, reg. 46 requiring the provision of ambulances and an ambulance room is addressed to the single controlling person. Reg. 42, which requires that all parts of a ship where work is being carried on shall be efficiently lighted, cannot be read distributively as addressed separately to every contractor who is doing particular work in any part of the ship. I construe the Regulations as requiring that the respondents in their capacity of occupiers of the whole shipbuilding yard should be responsible for the compliance with each and every duty imposed by Parts I. to VIII. When I turn to the Act of 1901, I find in the same way that, apart from certain special cases, a factory is to have a single occupier. This is sufficiently indicated by s. 149, sub-s. 2, which provides that a part of a factory or workshop may, with the approval of the Chief Inspector, be taken for purposes of the Act to be a separate factory or workshop, and by s. 151 which provides that the Secretary of State may, by special order, direct with respect to any class of factories or workshops that different branches or departments of work carried on in the same factory or workshop may for any of the purposes of the Act be treated as if they were different factories or workshops. It is admitted that there was no such approval or order that the No. 2 lower hold should be constituted a separate factory for the purposes of the operations of the Cork Co. or at all. There are also in the Act certain sections which deal with special modifications, for instance in the case of tenement factories. There may, it is true, be questions in certain cases whether a distinct portion of a larger area or building does not in fact constitute a separate factory in the particular case, but in the present case it seems to me to be clear that there was only one shipyard, namely, the whole of the premises occupied by the respondents in order to carry on their business.

But much reliance has been put by counsel for the respondents on s. 104 of the Act, which is headed "Docks." That section (which appeared as s. 23 in the Act of 1895) constitutes what was called by this House in *Mackey's* case (1) certain "notional" factories, that is to say, it provides that certain premises which are not factories within the definition of factories contained in s. 149 and the Sixth Schedule to Part II., should be, for the purpose of certain specified provisions of the Act, treated as if they were factories. The section goes on to provide that for purposes of enforcing those provisions of the Act the person having the actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof and certain machinery shall be deemed to be the occupier of a factory. So far as I follow the argument advanced for the respondents, the effect of this section is to vary the general meaning of "occupier" in the Act, and extend it to the person having the actual use or occupation of any part of the premises within the respondents' shipyard. I see several objections to this argument. The word "dock" is ambiguous. Its most familiar use is as meaning an enclosed area of water in which vessels may lie for loading or unloading, or when laid up or waiting for their turn at the berth. This is something different from a dry dock and from a wet dock or basin used in a shipyard for purposes of the fitting out or repair of vessels, both of which may form parts of a shipyard. In these latter cases there is not a "notional," but an actual, factory, so that prima facie the special provisions of s. 104 do not apply. But without

(1) [1918] A. C. 59.

affirmatively deciding that point, it is enough here to say that the claim in this action is brought under the Shipbuilding Regulations of 1931, which are validly made under s. 79 of the Act, and which apply to the whole premises of the shipyard, including the wet basin. It is not, as I understand, suggested that the provisions of s. 104 apply exclusively to whatever may be called in any sense a dock, so that the respondents' wet basin is excluded from the operation of the Shipbuilding Regulations. If, however, that were suggested, I should reject the suggestion. What I think is contended is that somehow s. 104 qualifies in this particular application what would otherwise be the effect of the Regulations and gives a different meaning to the word "occupier" by importing that the person in actual use and occupation of the No. 2 lower hold or the staging, that is, the Cork Company, is "deemed to be the occupier of a factory." But I find it impossible to bring s. 104 into the Shipbuilding Regulations so as to affect their operation. These are made under the general provisions of s. 79. Sect. 104 does not provide that Regulations made under s. 79 are to have effect in the manner specially defined in s. 104. All that it enacts is that the provisions of the Act with respect (inter alia) to Regulations for dangerous trade are to have that effect. This means that the Secretary of State is to have the same powers under s. 104 of making Regulations as are given by s. 79. But the Regulations in respect of which this action was brought, were not made in any sense under s. 104. The Secretary of State has made Regulations under s. 104 dealing mainly with loading and unloading. He has made no Regulations under s. 104 dealing with shipbuilding yards. It is unnecessary to consider whether he could validly have done so. It is enough to say that he has not. In my opinion s. 104 is irrelevant to any question of the Shipbuilding Regulations of 1931 and to the issues in this case.

I have sought to come to a decision of the appeal by considering the words of the Act and Regulations, which is in general the correct method of ascertaining the effect of legislation. And this question is not one in which the House is either aided or embarrassed by a wealth of decided cases more or less in point because I think the question raised in this appeal is res integra. I can deal shortly with some authorities which were discussed as pointing to a different conclusion. I am satisfied after careful examination that they do not affect the view which I have just expressed. These cases arose under s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, long since repealed, which had a curious provision that "factory" was to have the same meaning as in the Factory and Workshop Acts, 1878 to 1895, including s. 23 of the Act of 1895, and that "undertakers" in the case of a factory meant the occupier within the meaning of those Acts. Sect. 23 of the Act of 1895 corresponded to s. 104 of the Act of 1901. There was, it may be, a natural desire to give the benefits of compensation to the workman wherever possible. The Courts, in applying these provisions, first asked whether the place where the man was working was a place to which provisions of the Factory Acts extended and, if so, whether the defendant was an "occupier" under these Acts. It was held in various cases that in virtue of s. 23 of the Act of 1895 and s. 104 and cognate sections of the Act of 1901, these requisites were fulfilled. Thus in *Weavings* v. *Kirk and Randall* (1) the injured man was employed in erecting pigeon holes in a room at the top of a warehouse. There was no difficulty in applying to the words of the Workmen's Compensation Act, 1897, the precise terms of s. 104. But since, as I have already explained, s. 104 has not in my opinion any materiality in this case, the authorities discussed seem to me to afford no assistance.

As in my opinion the appellant was injured in consequence of a breach of reg. 13 (*b*) committed in the shipyard of which the respondents were occupiers, I think that this claim is established and would allow the appeal.

LORD PORTER. My Lords, I agree that this appeal should be allowed.

The appellant was employed by a company known as the

(1) [1904] 1 K. B. 213.

Cork Insulation Co., Ld., and was injured while working in the No. 2 lower hold of an uncompleted vessel called the *Dunedin Star*. This vessel was being constructed by the respondents for the Blue Star Line, Ld., under a contract in writing dated March 27, 1935. At the time at which the appellant was injured she had been launched and had been placed for finishing in a wet dock upon the respondents' premises. This wet dock formed part of the shipbuilding yard at Birkenhead which was owned by and in the general occupation of the respondents.

At the time when the plaintiff suffered his injury the respondents were still engaged in completing the vessel and had some 600 men at work upon her. At the same time No. 2 lower hold was being fitted with insulating material, and this work, which had been begun by a company known as Hall & Co., Ld., was being completed by the Cork Insulation Co., Ld.

Before any insulation was begun either by Hall & Co. or the Cork Insulation Co., the respondents had erected some staging in the No. 2 lower hold for the purposes of their own work. But once that work was finished they no longer required the staging and in the normal course it would then have been dismantled had it not been that Hall & Co. and the Cork Insulation Co. required it for the purpose of their work. The respondents themselves were not in any way concerned with the insulation; that was done by both Hall & Co. and the Cork Insulation Co. by direct contract with the Blue Star Line and at the vital moment the staging was being used solely by the latter company.

There were, however, some few plumbers employed by the respondents at work in other parts of that hold and a large number of their workmen occupied elsewhere in the ship. For their use the respondents required other staging and equipment and kept a gang of men whose duty was to go round the ship and see that all the staging and equipment was in order. It was convenient for those men to devote a small portion of their time to the examination, and if necessary repair, of the staging in the lower hold also. The respondents were, however, not under any obligation either to erect this staging or to supervise it or to keep it in repair, and evidence was given by the foreman of the gang that they took the additional work of examining the staging in No. 2 lower hold— to use his own words—" in their stride."

The injury to the appellant and the quantum of damage if recoverable have already been determined by the learned judge who tried the case.

The question with which this appeal is concerned is as to whether the respondents are liable for that injury and that damage. The case as pleaded was put in two ways. First it was said that the respondents were negligent and liable for their negligence. That claim has been abandoned. But secondly it was said that by the Regulations in relation to shipbuilding yards made under the Factory and Workshop Act, 1901, a statutory duty to maintain the staging in such a state of repair as to ensure the safety of the workmen using it was imposed upon the respondents.

By these Regulations it is provided that " it shall be the "duty of the occupier to comply with Parts I. to VIII. of these "Regulations."

Part II. contains amongst others the following provisions :—

> "11.—(*b*) All staging shall (i.) be securely constructed of "sound and substantial material and shall be maintained in "such condition as to ensure the safety of all persons "employed ; (ii.) be inspected at regular and frequent "intervals by a competent person.
>
> "(*c*) All planks intended to be used for staging shall "(i.) be carefully examined before being taken into use, "(ii.) be re-examined before they are used again after the "stages have been dismantled, by a person qualified to "detect faults in timber.
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> "13. All planks forming a rising stage at the bow end of "the ship shall be securely fastened to prevent slipping and "all planks forming other stages shall be so fastened unless "they extend eighteen inches or more beyond the inside "edge of the thwart or support on which they rest."

These Regulations are made under s. 79 of the Act of 1901 and are stated to apply to "the construction and repair of "ships in shipbuilding yards."

The accident appears to have happened in the following way: The planks forming the platform of the staging ran fore and aft and the bearers were placed athwart ship. These planks did not form a rising stage and they in fact extended more than eighteen inches beyond the inside edge of the thwart on which they rested, so that No. 13 of the Regulations was complied with.

Whilst the respondents were themselves using the staging they had lashed the planks to the bearers so as to prevent them from moving from their position. When, however, the Cork Insulation Co. began their work, at their request, some general lowering of the staging was carried out by the respondents, and in addition, probably because it was desired to drag the insulating cork which was being used across or along the planks in skips and because the lashing was calculated to interfere with the skips so dragged or to cause the men who were so dragging them to trip, that company requested the respondents' men to remove the lashings and this request was complied with. The result was that the planks were free to move and did in fact move from time to time, probably as a result of the skips being dragged over them. The respondents' evidence was that some complaint of this movement was made by the workmen who supervised the condition of the staging. They examined it, they said, twice daily and if the planks were found to have been moved they were replaced in their proper position. On November 6, 1935, however, whilst the appellant was working on the insulation for the refrigerating machinery in No. 2 lower hold and for that purpose was using the staging, the accident, the subject of these proceedings, occurred.

It was found by the learned judge to have been due to the fact that a plank resting upon one of the supports and forming part of the staging had moved and had become so unstable as to be dislodged when the plaintiff trod upon it in the course of his duties. In these circumstances prima facie if the Regulations which have been quoted, and those alone, applied, and if the respondents were occupiers and were guilty of a failure to fulfil reg. 11 (*b*) (i.) there would be no defence to this action.

In making this statement I have not forgotten the argument that the injury was not caused by the alleged breach of the statutory regulations but was caused by the intervening act of the Cork Insulation Co., Ld., either in requesting the respondents to undo the lashing of the planks or by dragging the skips across the planks in their then condition. No doubt if the planks had not been unlashed, and probably if the skips had not been dragged across them, no accident would have happened, but at least one cause and indeed an essential cause of the injury was the fact that the plank was loose.

It is said, however, in the first place that the Regulations are ultra vires on the ground that the persons alone concerned with the safety of these workmen were the Cork Insulation Co., Ld., and that Regulations which imposed a duty of ensuring their safety upon other persons were outside the scope of the Act. It was, it was said, no more permissible to make Regulations binding upon the owners of the shipbuilding yard in such a case than it would have been to make Regulations binding upon some totally extraneous person.

This argument has, I think, already been rejected in your Lordships' House in *Mackey* v. *Monks* (*Preston*), *Ld.* (1) It is true that the Regulations must appear to the Secretary of State to be reasonably practicable and to meet the necessities of the case, and therefore as Lord Parker pointed out in that case (2) must appear to him to be such as can be readily enforced without unduly interfering with the trade to which they relate. But subject to this limitation the widest possible discretion is given to the Secretary of State and it is his discretion, though, of course, it must be honestly exercised. In *Mackey* v. *Monks* (*Preston*), *Ld.* (1) it was held that Regulations might validly impose a duty upon the owner of the ship which was being discharged in dock though a stevedore was the occupier of the plant used in the process of unloading. The present case determines only that the Regulations may impose that duty upon the general occupier of a shipbuilding yard. The question is not as it was in *Mackey* v. *Monks* (*Preston*), *Ld.* (1) whether the duty can be imposed on a person other than the occupier, but whether it can be imposed upon a person other than the actual user of the portion of the factory of which complaint is made. In such a case I do not see why the obligation should not be placed upon the general occupiers where the general occupation of a shipbuilding yard and indeed of a ship under construction in it remains in them. Nor do I see why the legislation should not impose a duty upon them to see to the safety of the men employed upon the ship even though the particular work being done is done under a direct contract between the person for whom the ship is being built and an independent contractor.

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(1) [1918] A. C. 59.

(2) Ibid. 84.

It must be remembered that whatever liens may exist in favour of those for whom the ship is being constructed by reason of payments having been made in the course of the work, the ship still remains the property of the builders until she is completed and delivered, and that as a rule her completion and delivery are required before they have performed their contract or can obtain their final payment.

Taking the view, as I do, that the Regulations are intra vires, the question still remains whether the respondents are occupiers within the meaning of these Regulations. Round this point the principle argument on behalf of the respondent ranged. It was said that in construing the word " occupier " one must have regard not only to s. 79 together with s. 149 and the Sixth Schedule but also to s. 104.

Sect. 79 gives the power to make the Regulations and s. 149 and the Sixth Schedule include a shipbuilder's yard amongst the premises which are declared to be factories for the purposes of the Act. Sect. 104 is as follows: "104.—
"(1.) The provisions of this Act with respect to—

"(i.) Power to make orders as to dangerous machines "(section seventeen);

"(ii.) Accidents;

"(iii.) Regulations for dangerous trades;

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(1) [1918] A. C. 59.

"(iv.) Powers of Inspectors (section one hundred and "nineteen); and

"(v.) Fines in case of death or injury (section one "hundred and thirty-six) shall have effect as if every "dock, wharf, quay and warehouse and all machinery or "plant used in the process of loading or unloading or coaling "any ship in any dock, harbour or canal were included in "the word 'factory,' and the purpose for which the "machinery or plant is used were a manufacturing process; "and as if the person who by himself, his agents or workmen "uses any such machinery or plant for the before mentioned "purpose were the occupier of the premises; and for the "purpose of the enforcement of these provisions the "person having the actual use or occupation of a dock, "wharf, quay or warehouse or of any premises within the "same or forming part thereof and the person so using "any such machinery or plant shall be deemed to be the "occupier of a factory.

"(2.) For the purposes of this section the expression 'plant' "includes any gangway or ladder used by any person employed "to load or unload or coal a ship, and the expressions 'ship' "and 'harbour' have the same meaning as in the Merchant "Shipping Act, 1894."

As I understand the argument it was first claimed that the wet dock or basin in a shipbuilding yard was governed by the provisions of s. 104, and I suppose thereby taken out of the category of a shipbuilding yard or at any rate was to be regarded as a separate factory though within its boundaries. This appears to me to neglect the definition of a shipbuilding yard contained in the Act in the Sixth Schedule, Part II. (25.), namely, "any premises in which any ships, boats or vessels "used in navigation are made, finished or repaired," and also to neglect the fact that if it is not a shipbuilding yard the Regulations would not apply at all. The wet basin in question was admittedly being used for the purpose of finishing a vessel and appears to come directly under the terms of the Act and Regulations. It may well be that a shipbuilding yard like any other premises can be divided into separate compartments each occupied by a different person. In such a case each compartment would be a different factory and each separately occupied. For that contention, however, s. 104 is not required.

An alternative argument, however, was presented by which it was contended that the Regulations applied not only to factories as defined in s. 149 and the Sixth Schedule, but also to those included under s. 104. It was maintained, therefore, that where a dock forms part of a shipbuilding yard the Regulations apply to it not merely as forming part of a shipbuilding yard but also as a dock, and that consequently the provisions of s. 104 under which a dock is made a factory, and the person having the actual use or occupation of it or of any premises within the same or forming part thereof is to be deemed an occupier, were incorporated within the Regulations. I do not think that this contention should be accepted.

By s. 149 and the Sixth Schedule a shipbuilding yard as a whole is declared to be a factory. All that s. 104 does is to include amongst the premises which constitute a factory certain additional premises, one of which is a dock, and to define in the case of such premises who is to be regarded as the occupier of them in whole or in part. But where the premises as a whole are defined in the Sixth Schedule, as a factory within the meaning of the Act, the provisions of s. 104 are not required. The premises are already a factory and there is no reason for making them a statutory factory under the last mentioned section. Indeed, to judge by the collocation of the words the primary object of s. 104 was to deal with docks or other premises where loading or unloading took place and is not concerned with the case where the dock forms part of a shipbuilding yard.

Moreover the Regulations themselves are directed to apply to the construction and repair of ships in shipbuilding yards, a direction which is, I think, more consistent with an intention that the Regulations should apply and apply only to shipbuilding yards as defined by the Act, than that it should be intended to incorporate the provisions of s. 104 so as to give a special meaning in the case of docks to the word "occupier" when it is found in the Regulations.

If I am right in this view the Regulations only applied to the dock in question as part of the shipbuilding yard. It may be that separate occupation of the dock or of premises within or forming part of it, distinct from that of the rest of the yard could be shown by appropriate evidence, but except in the sense that the Cork Insulation Co. were alone using the staging or, as he says, this part of the ship, I do not think the learned judge finds any separate occupation on the part of that Company.

Nor do I think the respondents have adduced any such proof. I do not think the Cork Insulation Co., Ld., were in occupation either of the staging or the hold in which their work was going on. They appear to me merely to have had the use of the staging and to have carried on their work there. Certainly they were not in occupation of the ship, much less of the dock. The respondents were, I think, themselves occupiers of the yard and as such liable for the performance of the provisions of the Act, and if they did not fulfil them, for breach of statutory duty towards the appellant.

Even if, however, s. 104 applied and the question were whether the Cork Insulation Co., Ld., could be regarded as in occupation of any premises within or forming part of the dock, namely, the staging or the hold, I still think that the respondents would not escape liability : see *Houlder Line* v. *Griffin* (1), a case in which the decision of the majority of the House may be expressed in the words of Lord Macnaghten (2), where he is speaking of s. 23 of the Act of 1895, which, so far as affected that decision, was in similar terms to those of s. 104 and was in force at the time of the decision : "Now it seems "to me to be pretty clear, upon the true construction of these "somewhat singular provisions so curiously pieced together, "that the shipowner in the present case was not the occupier "of the dock where his ship was lying afloat, or of any premises "within the same or forming part thereof. It is, I think, "plain that by the expression 'dock' in the Factory Act, "1895, is meant the solid structure and body of the dock, "not the water space within its limits. A corresponding

(1) [1905] A. C. 220.

(2) Ibid. 224.

"meaning must be given to the word 'premises.' I do not "think that a ship lying in a dock, whether afloat or not, can "be included in the description of 'premises within the same "'or forming part thereof'."

In my view, therefore, whether the argument presented be that the dock and its contents were actually separately occupied or that they were notionally separately occupied under s. 104, the contention fails.

There remains the question whether the respondents, assuming that they were in occupation of the hold or staging, were guilty of a breach of reg. 11 (*b*). This, I think, is a question of fact and unless there was no evidence to establish it, has been found against the respondents by the learned judge who tried the case. Indeed, it is stated by Clauson L.J. to have been conceded in argument upon the appeal. I doubt whether it is now open to the respondents to contend the contrary and whatever course the case may have taken below, I think your Lordships' House must determine it on the basis of such finding and such assumption.

It was suggested that the only obligation under reg. 11 (*b*) (i.) was that the staging should be constructed of sound and substantial material and that such material should be maintained in a sound and substantial condition; that this provision did not deal with the method of constructing the staging but only with the material used and that the provisions as regards inspection and construction were dealt with in regs. 11 (*c*) and 13.

I do not think this construction is possible. If it prevailed, there would be no obligation upon erectors who had used good material to do more than inspect the staging which was originally and continued to be negligently fastened. The obligation in my view is to maintain the staging in such a condition both as regards material and manner of fastening as to ensure the safety of persons employed. But in determining whether there has been a breach or not, regard must I think be had to the whole of the provisions of Part II. of the Regulations and in particular to regs. 11 and 13, and inasmuch as it is contemplated under reg. 13 that planks extending more than 18 inches beyond the inside edge of the support on which they rest need not be fastened, I find it difficult to say there is necessarily an absolute obligation to fasten them lest those working upon the staging should knock them out of place. In the present case, however, the employees of the respondents upon their own evidence knew that work was being done which not only was likely to drive the planks out of place but actually was continually doing so. In such a case it may be that their duty was to insist upon relashing the planks or to devise other fastenings for them or to refuse permission for the Cork Insulation Co., Ld., to work in the hold unless they took steps to see that the planking was so maintained as to ensure the safety of their employees.

The matter, however, is one that I do not think it necessary finally to determine in the present case, and I prefer to rest my decision on this part of the case on the findings of fact of the learned judge in the Court of first instance, and the apparently unchallenged assumption of its accuracy in the Court of Appeal.

Appeal allowed.

Solicitors for appellant: *Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool.*

Solicitors for respondents: *Layton & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* MYERS . . . . APPELLANT.

AND

ELMAN . . . . RESPONDENT.

1939

Oct. 19, 23, 24, 25, 30; Dec. 5.

Solicitor—Alleged professional misconduct—Delivering defence suspected to be false—Filing inadequate affidavit of documents—Proceedings conducted by clerk—Liability of solicitor to pay costs personally—Jurisdiction of judge.

The jurisdiction of the Court to order a solicitor to pay the costs of proceedings is not limited to cases where he personally has been guilty of misconduct, but extends to a case where his managing clerk, to whom he has entrusted the necessary work, is guilty of misconduct, as, for example, in the preparation and filing of incorrect and inadequate affidavits of documents. The jurisdiction is not limited to deal with cases of misconduct or default, but extends to the case where costs have been improperly incurred or without reasonable cause or have proved fruitless by reason of undue delay in proceeding under a judgment or order.

An order for discovery requires the client to give information in writing and on oath of all documents which are or have been in his possession or power, whether he is bound to produce them or not, but as a client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, the latter has a peculiar duty as an officer of the Court carefully to investigate the position, and, as far as possible, see that the order is complied with. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information which he is entitled to require, or if the client insists on swearing an affidavit which the solicitor knows to be imperfect, the solicitor's duty is to withdraw from the case. A solicitor who has innocently put upon the file an affidavit by his client which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record.

Decision of the Court of Appeal (reported sub nom *Myers* v. *Rothfield* [1939] 1 K. B. 109) reversed, Lord Russell of Killowen dissenting on the ground that the evidence submitted to the House failed in his opinion to establish any of the charges against the managing clerk, and, therefore, the order against the respondent could not stand.

**Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

H. L. (E.)

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APPEAL from a decision of the Court of Appeal reported sub nom *Myers* v. *Rothfield*. (1)

At the conclusion of the trial of an action in which a verdict and judgment were given in favour of the plaintiff, an application was made on behalf of the plaintiff to the trial judge for an order that the solicitors for the respective defendants should pay to her the costs of the action and of the application on the ground, as was alleged, of their professional misconduct in the proceedings. The particular misconduct alleged against one of the solicitors was that he had delivered defences which he must have known or suspected to be false and that he had prepared and permitted his clients to make affidavits of documents which were inadequate and false. It appeared that the solicitor in question had left the conduct of the proceedings in the action largely to his managing clerk, who though not an admitted solicitor was a solicitor's clerk of ability and long experience, and that, on the solicitor himself intervening, he at length obtained from the clients a further and adequate affidavit of documents.

Singleton J. who tried the action held that the solicitor had not been guilty of professional misconduct in allowing the defences to be delivered, but that he had been guilty of such misconduct in allowing the inadequate affidavits of documents to be made, and the judge accordingly ordered that the solicitor should pay one-third of the plaintiff's costs of the action and two-thirds of the costs of the application.

On appeal by the solicitor to the Court of Appeal it was held by Greer and Slesser L.JJ., MacKinnon L.J. dissenting, that, assuming that the acts in question, if done by a solicitor personally, would constitute professional misconduct on his part, the solicitor was not liable in this case, inasmuch as he had appointed a fully qualified clerk to do such business, and the acts had been done, not by the solicitor himself, but by the clerk; and further, that, even if the solicitor himself had prepared and delivered the defences, he would not by so doing have been liable, since it was not professional misconduct in a solicitor to prepare and deliver on behalf of his client a

(1) [1939] 1 K. B. 109.

defence which he might himself suspect contained misstatements or raised false issues and put the plaintiff to the proof of his case.

The plaintiff appealed to this House.

R. A. Willes and *G. B. Croasdell* (for *L. H. Gluckstein* on active service) for the appellant. The substantial question is this : does a solicitor who, without exercising any supervision, delegates his duty to a managing clerk who is not a solicitor, secure thereby immunity from the disciplinary action of the Court even where the clerk has been guilty of misconduct in the discharge of his duty. The Court regards misconduct committed in the course of proceedings before the Court as misconduct by the solicitor whose name is on the record, and though it will carefully investigate the circumstances in which the misconduct complained of arose, and will give the solicitor the fullest opportunity to make an answer or explanation, it will not allow him, as the officer responsible, seeing that his name is on the record, to avoid responsibility by alleging and proving that in fact the act complained of was done by his unqualified managing clerk. In *Norton* v. *Cooper. In re Manby and Hawksford* (1) a member of a firm of solicitors who was not personally cognizant of his partner's act in bringing an action in the name of a person without that person's authority, was held liable in respect of costs. In *Dunkley* v. *Farris* (2), where an attorney's clerk fraudulently simulated the Court seal upon a writ of summons, the Court not only set aside the writ and all proceedings thereon, but ordered the attorney, though personally blameless, to pay the costs. In *Simmons* v. *Rose* (3) a country solicitor was made liable for a loss though the representations giving rise to the claim were made by his London agents. See also *Schmitten* v. *Faulks* (4) as to a solicitor's liability. The principle laid down by the Court of Appeal that a solicitor is not liable for the misconduct of his clerk is erroneous.

[LORD PORTER referred to *Wheatley* v. *Bastow*. (5)]

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(1) (1856) 3 Sm. & G. 375 ; 26 L. J. (Ch.) 313.

(2) (1851) 11 C. B. 457.

(3) (1862) 31 Beav. 1.

(4) [1893] W. N. 64.

(5) (1855) 7 De G. M. & G. 261, 558.

T. F. Davis and *T. J. F. Hobley* for the respondent. Where a charge of professional misconduct is made against a solicitor it must be shown that he personally has been guilty, and that has not been established in this case. The charge made is in effect quasi-criminal, and to establish it it must be proved in the strictest way, the onus of proof being on the person making the charge. Here we submit that there was no evidence against the respondent. No doubt the Court can order a solicitor to pay costs even where the neglect or default is not personal to himself, but where a charge of professional misconduct is made he cannot be held guilty unless he personally is implicated. There is no ground for suggesting that the respondent was aware of what the clerk had done. With regard to the cases cited for the appellant, none of them establishes any principle of liability applicable in the present case. In *Norton* v. *Cooper. In re Manby and Hawksford* (1), the complaint was made by the solicitor's own client—a matter which would now be dealt with under Order 65. In no way was that case analogous to the present one. In *Dunkley* v. *Farris* (2), the clerk had fraudulently simulated the Court seal—a circumstance quite different from this case. The like criticism is applicable to the other decisions referred to. In no case has it been laid down that, apart from personal misconduct, a solicitor has been held liable to the disciplinary jurisdiction of the Court. They also referred to *In re Dangar's Trusts* (3), and *Marsh* v. *Joseph*. (4)

R. A. Willes replied.

The House took time for consideration.

1939. Dec. 5. VISCOUNT MAUGHAM. My Lords, this is an appeal by the applicant (who was the plaintiff in the action) against a judgment of the Court of Appeal of England dated July 11, 1938, allowing the appeal of the respondent (who was the solicitor on the record for two of the defendants in the action—namely, Henry Isaac Rothfield and Nathaniel

(1) 3 Sm. & G. 375.
(2) 11 C. B. 457.
(3) (1889) 41 Ch. D. 178.
(4) [1897] 1 Ch. 213, 244, 245.

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Rothfield) against an order of Singleton J., dated May 13, 1938, whereby the learned judge ordered the respondent to pay to the applicant one-third of the taxed costs of the action and also two-thirds of the costs of the application against the respondent and other solicitors, such costs to be taxed.

The questions raised by the appeal are whether in the circumstances the respondent was guilty of professional misconduct; whether the learned judge misdirected himself in holding that the respondent was guilty of professional misconduct, and whether there was any jurisdiction to order the respondent to pay costs to parties for whom he was not acting as solicitor in so far as the conduct complained of was not committed by him but by his managing clerk, Mr. Osborn, who was not a solicitor.

The writ in the action was issued on November 3, 1936. The respondent accepted on behalf of the defendants, Henry Isaac Rothfield and Nathaniel Rothfield, service of the writ and of the statement of claim which was delivered therewith. The plaintiff's claim as set out in the statement of claim alleged that the defendants were conducting a systematic swindle by means of a bogus and fraudulent business carried on as Horwood & Co., and alleged that various fraudulent misrepresentations were made whereby the plaintiff had been defrauded of various sums and securities amounting to 9560*l.* 2*s.* The details of the fraud will be stated by my noble and learned friend Lord Wright.

The defendants, in addition to Henry Isaac Rothfield and Nathaniel Rothfield, were Norman Baron Rothfield, a firm sued as Rothies, and, lastly, the firm of Horwood & Co. The service on that firm resulted in the appearance of one Morser, who was served as a partner in that firm. Owing largely to difficulties with regard to discovery, the action could not be brought to trial until March 7, 1938. Though Norman Baron Rothfield was the only defendant who actually appeared and disputed the claim, the trial of the action lasted five full days. The jury's verdict in favour of the plaintiff awarded her 9400*l.* damages for fraudulent conspiracy for which judgment was entered against all the defendants with the costs of the action. It is stated that nothing could be recovered from any of the defendants.

Immediately after such judgment had been entered counsel for the plaintiff invited the learned judge, in the light of the evidence and of the facts disclosed relating to the conduct of the solicitors appearing on the record for the respective defendants, to exercise the Court's jurisdiction over its officers, and to order and direct such solicitors to pay the costs so recovered from their respective clients on the ground that such solicitors and each of them had been guilty of professional misconduct as officers of the Court in conducting the defences of their clients.

The learned judge directed notice to be served on the respective solicitors of the grounds of complaint against each of them respectively, and, this having been done, he re-heard the application and (holding that there was not sufficient justification for an order against one of the solicitors concerned) directed an inquiry into the conduct of three other solicitors, one of whom was the present respondent, which, after further and elaborate particulars had been delivered, was specially fixed to be heard by the learned judge on the first day of the following sittings, April 26, 1938. The hearing lasted for five days. The learned judge, in addition to the evidence he had heard during the trial, heard the evidence of the plaintiff's solicitors' managing clerk. He also heard the evidence of Mr. Elman (the respondent) and of Mr. Osborn, his managing clerk. He had before him a considerable correspondence between Mr. Elman and his clients which the appellant's advisers had not previously seen.

Singleton J. in his considered judgment, held that Mr. Elman was not guilty of professional misconduct in filing defences which put in issue the charges of fraud made against his clients. But finding that both Mr. Elman and his clerk, between whom he found himself unable to draw any distinction, " knew a good deal about the matters in question," and that they had " as a result of a deliberate policy adopted "in Mr. Elman's office," in the conduct of the defence, and in relation to discovery, " increased the plaintiff's difficulties, "added to the expense, and obstructed the interests of "justice," he held Mr. Elman guilty of professional misconduct as a solicitor and an officer of the Court, and he made the order stated in the first paragraph above.

The respondent appealed to the Court of Appeal against the order of Singleton J. and by an order dated July 11, 1938, the Court of Appeal by a majority rescinded the order. Greer and Slesser L.JJ. were in favour of allowing the appeal, MacKinnon L.J. agreed with Singleton J., but expressed the view that his order erred on the side of leniency.

My Lords, as I understand the judgments of Greer and Slesser L.JJ., those learned judges were of opinion that the jurisdiction of the Court to order a solicitor to pay the costs of proceedings is a punitive power resting on the personal misconduct of the solicitor and precisely similar to the power of striking a solicitor off the rolls or suspending him from practice. If this is a correct view no doubt it would follow that the solicitor ought not to be ordered to pay costs unless he has himself been guilty of disgraceful conduct; and it would follow that however negligent or obstructive or improper his conduct of the proceedings as solicitor has seemed to be, whatever injury has been inflicted on the other party or parties to the litigation, he has only to show that he left the whole matter in the hands of a clerk and he will then escape the jurisdiction of the Court in relation to costs. It would also seem to follow that if instead of a single solicitor a firm with two or more members is acting for the client it will be necessary in such a case to inquire into their several responsibilities and an order can only be made against those partners who can be shown to be personally involved. I am unable to agree with the main proposition, for which I may add there seems to be no authority. The jurisdiction to strike off the rolls or to suspend a solicitor seems to me to be of a very different character. Apart from the statutory grounds, it is of course true that a solicitor may be struck off the rolls or suspended on the ground of professional misconduct, words which have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency: *In re a Solicitor. Ex parte The Law Society.* (1) Mere negligence, even of a serious character, will not suffice. The application is strictly personal and relates to the solicitor himself and his fitness to practise. In my opinion the jurisdiction as to costs is quite different. Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The primary object of the Court is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. Order LXV., s. 11, of the Rules of the Supreme Court provides the necessary machinery where the person injured is the client of the solicitor. It is a rule supplementary to the summary jurisdiction of the Court. It is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or which have proved fruitless by reason of undue delay in proceeding under a judgment or order. The jurisdiction to order the solicitor to pay costs to the opposite party is exercised on similar grounds. The principle will be found clearly stated in Halsbury's Laws of England, 2nd ed., vol. xxxi., p. 271, where a number of authorities are cited. It will be found that many of these authorities depend, in cases where the order as to costs has been made, on the negligence or mistake of the solicitor and in that sense only on his misconduct in the proceedings. Some of the cases are those where the solicitor has instituted an action without proper authority, and it may be that they can be supported on the ground that in such cases the solicitor has warranted that he has the authority of his client to act for him in the litigation; but it must be observed that that is not the ground stated by the Court and I think they rest on the jurisdiction of the Court over its officers. I propose to select a few cases only for comment, since some of your Lordships will deal with the others.

In the case of *In re Jones* (2), Lord Hatherley L.C. laid down the rule with his usual clearness. It was a case where the solicitor had engaged to indemnify the plaintiff against the costs of a doubtful suit which failed. The defendants, failing to recover their costs from the plaintiff, applied by petition for (amongst other things) an order on the solicitor to pay their costs. Lord Hatherley began by laying down the general principle. He said, " I think it the duty of the Court to be "equally anxious to see that solicitors not only perform their "duty towards their own clients, but also towards all those "against whom they are concerned." He added that care should be taken to see that the litigation is the bona fide litigation of the client who instructs the solicitor and not one carried on altogether on the solicitor's account, a well known proposition with which we are not concerned here. The solicitor was ordered to pay the costs. I cannot find that the proposition laid down by Lord Hatherley has ever been doubted and the cases cited in Halsbury certainly tend to support it. It is hardly necessary to point out that Lord Hatherley's phrase implying the solicitor's duty to parties for whom he is not acting is founded on his duty to the Court.

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(1) [1912] 1 K. B. 302.

(2) (1870) L. R. 6 Ch. 497.

Nor is the proposition a modern invention. To go no further back than Serjeant Sayer's book on the Law of Costs, 2nd ed. (1777), it will be found that he has a chapter (No. 47), " Of the "liability of an attorney in a cause to pay costs." He cites there six cases, the first being thus described: " Many "mistakes having been made by the plaintiff's attorney in the "*Copy of a Capias*, a rule was made for him to show cause why "he should not pay to both plaintiff and defendant the costs "occasioned by those mistakes" : *White* v. *Washington*. (1) We are left to infer that the rule was made absolute, and the same observation applies to a statement of the case in Barnes' Notes of Cases, 3rd ed., p. 411. In another case cited in Sayer, *Fowke* v. *Horabin* (2), a rule was made for the plaintiff's attorney, guilty merely of gross mistakes in a certain record which had to be amended, to pay the costs occasioned by the amendments (see the statement of the case in Barnes' Notes, 3rd ed., p. 11). These cases did not depend on disgraceful or dishonourable conduct by the solicitor, but on mere negligence of a serious character, the result of which was to occasion useless costs to the other parties.

(1) (1738) Cooke's Practice Cases, 152.

(2) (1740) Barnes' Notes 11.

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If then as I think the authorities show that the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk, for whose actions within the scope of his authority he is liable. That a partner in a firm of solicitors cannot escape from such an order on the ground that he took no active part in the proceedings seems to me to be clear. If authority is needed I think the case of *Norton* v. *Cooper* (1) may be referred to. A firm of solicitors having instituted a suit without a satisfactory retainer and the suit having failed, Sir John Stuart V.-C. ordered the firm to pay the costs incurred by the plaintiff in the suit. One partner alone was concerned in the suit and the other partner contended that he was in no degree liable. The Vice-Chancellor observed: "The safety of the public and the rules of Court are to be "satisfied only by holding, in a case of this kind, that, so long "as Mr. Hawksford (the innocent partner) continued to "appear as one of the solicitors of the plaintiff on the records "of the Court, he is responsible for what took place in the "conduct of the cause." If this is true of an innocent partner it must be equally true if a person being solicitor on the record in an action or other legal proceedings chooses to leave the actual conduct of the matter to a managing clerk. The other parties have no means of knowing what particular part the solicitor, as distinguished from his clerk or his partner, has taken in the matter. If we rely on the principle laid down by Lord Hatherley, it is clear that the principle would be to a large extent useless if a solicitor on the record has merely to leave everything to a clerk.

My conclusion is that Mr. Elman cannot dissociate himself from the acts and defaults of Mr. Osborn, and in what follows I shall generally omit any reference to him and shall treat his acts as being those of his principal.

My Lords, if we approach the facts on the footing that Mr. Elman as an officer of the Court owed a duty to the Court in the proceedings by Mrs. Myers against Norman Baron Rothfield, Henry Isaac Rothfield, Nathaniel Rothfield, and

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(1) 3 Sm. & G. 375; 26 L. J. (Ch.) 313.

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the two firms, and that he was responsible in the performance or non-performance of that duty for the acts or defaults of his managing clerk, a good many of the difficulties disappear. But, although in the view I take it is not necessary to show that Mr. Elman has been guilty of conduct which would justify the punishment of striking him off the rolls or of suspending him from practice, I entirely agree with the contention that the jurisdiction in question ought to be exercised only when there has been established a serious dereliction of duty as a solicitor either by himself or by his clerks. The findings of Singleton J., after a long and patient inquiry and after hearing the evidence of Mr. Elman and his managing clerk, would seem to settle that question; but the matter is undoubtedly one of great importance to Mr. Elman and we have had the advantage of an elaborate hearing in which the whole of the material correspondence and the evidence given on the inquiry before Singleton J. have been exhaustively considered. I am unable to come to any conclusion different from that of the learned judge; and I shall endeavour as briefly as possible to state my reasons, bearing in mind that Mr. Elman is in no way responsible for the frauds of which his two clients have been guilty.

The particulars given before the inquiry directed by Singleton J. began included two matters, first, the filing of defences by his two clients which he knew to be false, and, secondly, that he prepared and advised and permitted his clients to make and file affidavits of documents which were wholly inadequate and false. On the first charge the learned judge absolved Mr. Elman; on the second he found that the charge was true. I think it useful to observe here that there is this plain distinction between defences which consist—as they did here—of a denial of allegations and untrue affidavits of documents. The defences are not on oath and they merely put the plaintiff to the proof of the allegations in the statement of claim; and moreover, as the learned judge pointed out, there is in such a case as the present a matter of damages which must be determined if the plaintiff's allegations are proved. On the other hand in many actions and in particular in such an action as Mrs. Myers had brought, based on disgraceful frauds, and on fraudulent conspiracy of the most shameless character, it is essential in the interests of justice that the defendants should be compelled to make full disclosure of all the documents bearing on the alleged frauds in the form of proper affidavits of documents. If the defendants are guilty of the alleged frauds, it is hardly to be expected that they will make adequate affidavits without considerable pressure. However guilty they may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon the file.

A further observation should be made here. Suppose that in such a case the client swears an affidavit of documents which discloses nothing relating to the frauds alleged in the statement of claim and suppose that the solicitor has previously given his client full and proper advice in the matter but has no good reason to suppose that the affidavit is untrue, it may be asked what else ought the most punctilious solicitor to do? My answer is nothing at that time. But suppose that, before the action comes on for trial, facts come to the knowledge of the solicitor which show clearly that the original affidavit by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff, and to the Court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record. The duty of the client is equally plain. I wish to say with emphasis that I reject the notion that it is justifiable in such a case to keep silence and to wait and wait till the plaintiff succeeds, if he can, in obtaining an order for a further and better affidavit. To do so is, in the language of Singleton J., to obstruct the interests of justice, to occasion unnecessary costs, and—even if disclosure is ultimately obtained—to delay the hearing of the action in a case where an early hearing may be of great importance.

The relationship of the three Rothfields, the dates of the events in this eventful story, and the early history of the fraudulent family so far as it was known to Mr. Elman are of first-rate importance in considering the circumstances proved as to the various affidavits of documents sworn by his clients. It should be observed that the three Rothfields were the main defendants in the action. Henry Isaac Rothfield was the father of Norman Baron Rothfield and Nathaniel Rothfield. The first of these three was, to the knowledge of Mr. Elman, an undischarged bankrupt, having been so adjudicated in 1922 and again in 1928. Nathaniel was an infant when the writ was issued. He attained his age of twenty-one years on May 17, 1937, and he then adopted the defence filed on his behalf by Mr. Elman acting for the guardian ad litem. Another material fact is that Henry Isaac Rothfield was arrested on November 13, 1936, and charged with the Horwood & Co. frauds, including that practised on Mrs. Myers. Mr. Elman obtained bail for him and he was apparently at large till September 7, 1937, when he was convicted at the Old Bailey of all the frauds, including those the subject of Mrs. Myers' action, and sentenced to four years' penal servitude. It is not surprising that he did not appear at the trial in the following March. Nor did Nathaniel Rothfield, who had gone in January, 1938, to the West Indies on the ground of ill-health.

Henry Isaac Rothfield and Nathaniel Rothfield were not strangers to Mr. Elman when he entered appearances for them in the Myers action (November 6, 1936). In March, 1935, he had acted for Morser in the purchase of the business of Horwood & Co. In December of that year on the instructions of Nathaniel Rothfield (aged nineteen) he acted in the incorporation of a private company called the Mushroom Farmers' Association, Ld. In the following January he acted for that company in an action brought against it for passing off and breach of copyright. Nathaniel Rothfield was the sole director of the company. Mr. Elman knew that the father was an undischarged bankrupt, a circumstance which might explain his absence from the board. In March, 1936, it is proved that Mr. Elman was giving advice to Henry Isaac Rothfield and Morser in relation to the formation of a limited company to take over the business of Horwood & Co. He appears to have opposed such a step, and it is plain that he must have known something of its activities to have been in a position to give that advice. In April, 1936, and at subsequent dates up to June, 1937, he acted for Nathaniel Rothfield in the purchase of a number of small properties which were conveyed to Norman Baron Rothfield as trustee for Nathaniel, who, ostensibly at least, found the purchase moneys. On June 19, 1936, an action claiming damages for frauds of the share-pushing kind was commenced by Lady Chichele-Plowden against one Thomas Livingstone, Henry Isaac Rothfield and Nathaniel Rothfield. Mr. Elman arranged that Norman Baron Rothfield should be guardian ad litem for his brother Nathaniel, and Mr. Elman entered appearances for all three defendants. On July 31, 1936, a Mr. Still commenced a similar action which (after amendment) claimed damages against Morser, Henry Isaac Rothfield and one MacArthur. Morser and Henry Isaac Rothfield consulted Mr. Elman, and he delivered the latter's defence on January 11, 1937. Morser joined Henry Isaac Rothfield and Nathaniel Rothfield as third parties and claimed to be entitled to be indemnified by them. Mr. Elman acted for them on this claim, which was afterwards dismissed on the ground that it was founded on a fraudulent conspiracy. The action succeeded on May 25, 1937. The Myers action began on November 3, 1936.

The degree of acquaintance between Mr. Elman and Henry Isaac Rothfield is to be surmised from a letter dated March 15, 1937 (four months after the arrest of this client on a grave charge of fraud). It is in these terms :—

"Dear Henry,

" re Myers, Still, &c.

"I find from certain correspondence which has been "supplied to me and which I have not heard of or seen "before that your position as between H. Morser and "yourself in the Third Party proceedings and which "proceedings are open and well known to the various "plaintiffs, will require very careful explanation.

"In order that you will understand my meaning, I enclose "herewith copies of three letters and shall be glad to know "exactly how you are proposing to deal with it.

"Yours truly,
Burnett L. Elman.

"Mr. Henry Rothfield,
"Highcroft Farm,
"Highcroft,
"Wickford,
"Essex."

It may be noted in passing that Highcroft Farm, where Henry Rothfield was residing, was one of the properties bought by Nathaniel Rothfield, and it may be surmised that the latter was on good terms with his father. The important points about the letter are, first, that Mr. Elman addressed his client in familiar fashion by his first name, and, secondly, that the three letters seemed to have caused Mr. Elman some perturbation of mind. My Lords, I am not surprised. The three letters, which the learned judge cited in full, seem to me to establish beyond reasonable doubt that Henry Isaac Rothfield was the virtual owner and in any case the prime mover in the activities of Horwood & Co., and that Morser, as he was contending in the Still action, was little more than a dummy. It should be added that Morser had been arrested in September, 1936, as the presumed owner of the business of Horwood & Co., and that his release was followed by the arrest of Henry Isaac Rothfield—facts which pointed in the same direction.

The close connection of Henry Isaac Rothfield with the business of Horwood & Co. can scarcely have come to Mr. Elman as a complete surprise. On August 20, 1936, there had been an interview at Mr. Elman's office at the instance of some respectable brokers who had been innocently connected with the fraudulent sale by Horwood & Co. of certain valuable shares belonging to Mrs. Myers. Several persons were present including Mr. Elman in person, a representative of the brokers, and Mr. Barker, a clerk sent by Messrs. Peacock & Goddard, the solicitors for Mrs. Myers. (Her action, it will be remembered began a fortnight later.) A letter to "Mr. Horwood" by Mrs. Myers relating to her shares was read aloud by Mr. Elman. The evidence given by Mr. Barker on the inquiry was that those present throughout referred to Mr. Rothfield as being Horwood and the witness added that it was obvious that Mr. Elman knew Mr. Rothfield was Mr. Horwood. It should also be stated that when Mr. Elman was asked for copies of the letters addressed to or coming from the possession of Horwood & Co., he said he would "get into touch with "Mr. Rothfield" and subject to that would supply the copies. Counsel for Mr. Elman, with, I think, admirable discretion, did not ask any questions in cross-examination on these points. There was of course, to the knowledge of Mr. Elman, no "Mr. Horwood" at this time; and he did not apparently think that any one really controlled Horwood & Co. except Henry Isaac Rothfield. This person in fact had pretended to be Mr. Horwood at a lunch he gave to Mrs. Myers.

Mr. Elman's knowledge of Nathaniel Rothfield was perhaps not so intimate. As we have seen, he acted for him in the formation of a company and in the purchase of a number of properties. He knew that this precocious infant had at least one banking account, for on August 10, 1936, he received a cheque for 1000*l*. from him drawn on Nathaniel's own account at Lloyds Bank, 222, Strand. On August 17, 1936, he delivered the defences of Henry Isaac Rothfield and Nathaniel Rothfield in the Lady Chichele-Plowden action, presumably on instructions.

My Lords, when the statement of claim in the Myers case was delivered, the knowledge already at the disposal of Mr. Elman was more than enough to put him on his guard. The case reeked with fraud. The charges made in the various proceedings against Henry Isaac Rothfield and Nathaniel Rothfield might no doubt be untrue and the criminal proceedings against the father might break down; but the clouds seemed to be gathering and care was necessary. The first affidavits of documents sworn by Henry Isaac Rothfield and Nathaniel Rothfield in the Myers action, dated March 1, 1937, disclosed nothing of the connection of either with Horwood & Co. I will assume that at that time Mr. Elman had nothing but suspicions as to the inadequacy of these affidavits. He was, however, warned by Messrs. Peacock & Goddard by a letter of March 5, of the many documents which were undisclosed. This letter and a number of subsequent letters are set out in full in the judgment of Singleton J. and I cannot usefully transcribe them here. That Mr. Elman was under no illusions after he had obtained, in March, 1937, the three letters above referred to seems to be clear from his letter to Nathaniel Rothfield on May 5, 1937, in which he told his client that there should be in his possession pass-books showing payments made by him in connection with his purchase of shares in Consolidated Gold Alluvials of British Columbia, Ld. (a purchase which formed part of the fraud on Mrs. Myers), and his transactions in connection therewith with Horwood & Co. Mr. Elman did nothing to compel the production of these documents and it was left to Messrs. Peacock & Goddard to obtain an order for further discovery. On May 3, 1937, a second affidavit of documents by Henry Isaac Rothfield was filed by Mr. Elman. A second affidavit by Nathaniel Rothfield was resisted but an order was finally obtained.

Nathaniel Rothfield's second affidavit was sworn May 29, 1937. It disclosed a mass of documents, including correspondence between Nathaniel Rothfield and Horwood & Co. relating to his transactions with that business in connection with Consolidated Gold Alluvials Shares and it also included a limited number of entries in Nathaniel Rothfield's bank pass-book of his account at Lloyds Bank (Law Courts Branch). During inspection of the documents so disclosed on June 8 and 23, 1937, the plaintiff's solicitors, while protesting against the inadequacy of the disclosures, pointed out to Mr. Elman's clerk that even in the documents which were disclosed there appeared references to other banking accounts which Nathaniel Rothfield had not disclosed.

Mr. Osborn informed Singleton J. at the inquiry that the Lloyds Bank pass-book had not been examined by him and had been sealed up by Mr. Elman's clerks in accordance with Nathaniel Rothfield's instructions. When that pass-book was first produced to the plaintiff's solicitors only certain debit items and four credit items were disclosed. The period covered by such items was January 6 to August 18, 1936. This pass-book was not completely disclosed to the plaintiff's solicitors till the month of November, 1937, though Mr. Osborn stated that in fact it had been in Mr. Elman's office for over a fortnight in the month of June, 1937. When it was examined by the learned judge it appeared that upwards of 54,000*l.* had passed through this account in a period of approximately fifteen months (August, 1935—November, 1936), and it also appeared that in that pass-book on the same page as that on which an entry had been disclosed there appeared, amongst the entries which had been concealed, an entry showing a payment in cash of 1000*l.* to Mr. Elman on August 10, 1936, and another showing a payment on the same day, simply "cash 1000*l.*"

My Lords, like Singleton J., I do not believe that Mr. Elman never looked at the pass-book. It was his duty to look at it; for I cannot think that, in the very peculiar circumstances of this case, it was right for Mr. Elman to leave it to his client to say what items in the account ought to be disclosed. The case was one in which full disclosure of the banking accounts was a vital matter. Nor was it right to go on resisting discovery, and in effect, as Singleton J. observed, to leave it to Nathaniel Rothfield to say what was relevant, and to be willing to act upon that in so far as Mr. Elman's dealings with the plaintiff's solicitors were concerned. These were breaches of his duty to the Court in the circumstances of this case. It was not till November 30, 1937, after considerable expense and delay that Nathaniel Rothfield as the result of an order was compelled to swear his third affidavit of documents. The case against him was then clear beyond doubt, for the Lloyds Bank account in full and other banking accounts which he produced made it clear that he had taken an important part in the Horwood & Co. frauds. The details are contained in the judgment of Singleton J., and I cannot set them out here. It had thus taken from January 28, 1937, to November 30, 1937—and three orders of the Court—to obtain a satisfactory affidavit of documents from Nathaniel Rothfield. I will not deal with the application made in the name of Nathaniel Rothfield to postpone the hearing of the case in order that he might appear as a witness, except to say that I do not believe that he ever intended to enter the witness-box. As the result of the application, the action did not come on for trial till March 7, 1938. Neither solicitor nor counsel appeared for Henry Isaac Rothfield and Nathaniel Rothfield. It is not without signficance that Mr. Elman never at any time sought to inspect any of the numerous documents disclosed by the plaintiff.

I think I have said enough to show why I agree with the findings of the learned judge and why I think that his inferences where the matters depended on inference were fully justified. He had heard and seen the witnesses, and in view of the knowledge which Mr. Elman admittedly possessed of the activities of the Rothfield family, and to his statements and those of his clerk in the witness-box, which I have read with care, and to the correspondence which was disclosed, it is my opinion that Singleton J. was amply justified in concluding that Mr. Elman was guilty of professional misconduct in not insisting on his clients disclosing the relevant documents as soon as he knew that they were or had been in their possession, custody or power, and in preparing and putting on the file affidavits of documents which he knew to be very inadequate. It is clear that MacKinnon L.J. was of the same opinion on the facts, and it seems probable that Greer L.J. and Slesser L.J. also agreed with their colleague as to the facts and only disagreed on the question of law.

My Lords, I think this appeal should be allowed with costs here and below and the order of Singleton J. should be restored.

LORD ATKIN (read by LORD WRIGHT). My Lords, this is an appeal from the Court of Appeal, who by a majority allowed an appeal from an order of Singleton J., who after an inquiry lasting five days had ordered the respondent, a solicitor who had acted for two of the defendants in an action of *Myers* v. *Rothfield and others*, to pay part of the costs of the action of the successful plaintiff. The ground was that the solicitor had been guilty of misconduct. The misconduct found by the judge was that in allowing certain affidavits of discovery to be sworn and put on the file he was allowing something to be done which he knew to be wrong and that in resisting further discovery he was obstructing the interests of justice and causing delay. The facts disclosed in the inquiry showed that during the course of the action the solicitor Mr. Elman was for some weeks at a time absent from his office, and that he had entrusted the conduct of the litigation generally to the charge of his managing clerk, Mr. Osborn, unadmitted but having a large experience of the conduct of litigation. The judge expressed himself as unable to draw any distinction between Mr. Elman and his managing clerk, for whom he was responsible. I think it fair to assume, as was done in the Court of Appeal, that such a phrase indicates that the learned judge was not finding that Mr. Elman himself was personally a party to the misconduct found. The majority of the Court of Appeal (Greer and Slesser L.JJ.) were of opinion that the learned judge could not exercise his punitive jurisdiction over a solicitor unless the solicitor personally had been guilty of misconduct and discharged the order. MacKinnon L.J. dissented. My Lords, I believe that all your Lordships are of opinion that the view taken by the majority of the Court of Appeal was incorrect.

From time immemorial judges have exercised over solicitors, using that phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. But as far as the interests of the Court and the other litigants are concerned it is a matter of no moment whether the work is actually done by the solicitor on the record or his servant or agent. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case. Misconduct of course may be such as to indicate personal turpitude on the part of the person committing it and to lead to the conclusion that the party committing it, if an officer of the Court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated. Some confusion has, I think, arisen from the fact that charges of personal misconduct have been generally brought by a special procedure, by a rule or order to answer allegations made in an affidavit, later by a report by the Discipline Committee of the Law Society, and now since 1917 by proceedings before the Society, who themselves determine the fact and the punishment. Such cases involve personal misdoing: they are rightly termed cases of professional misconduct; but the words "professional misconduct" themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all they only mean misconduct in the exercise of the profession: and they cover cases where a duty is owed by the solicitor to the Court and is not performed owing to the wrongdoing of the clerk to whom that duty has been entrusted. In *Dunkley* v. *Farris* (1) the solicitor's clerk had forged the seal of the Court to the writ. *In re Eyre. Palmer* v. *Evans* (2) the solicitor's clerk had falsely represented to the defendant that judgment had been signed and execution issued whereby he had paid an unnecessary sum for costs; in neither case was the solicitor personally implicated; but in both he was ordered to pay the costs and in the latter case to refund the excessive costs. In both cases, it may be observed, the application was to the full Court that the solicitor should answer matters contained in an affidavit, upon which the Court could proceed to attachment or to suspension or removal from the rolls. It seems to me quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which the Court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The Court is not concerning itself with a breach of duty to the other litigant but with a breach of duty to itself. Its jurisdiction is punitive, and is exercised in appropriate cases and in appropriate measure where there has been no personal complicity by the solicitor charged.

The only question that remains is whether the judge was right in his finding that the managing clerk, Mr. Osborn, had been guilty of misconduct which justified the order against his principal to pay part of the costs of the action. It is to be noticed that the judge laid down for himself a standard which was perhaps too favourable to the solicitor. "By misconduct," he said, "is meant something which would reasonably be "regarded as disgraceful or dishonourable by solicitors of "good repute; for example, wilfully misleading the Court in "the conduct of a case." I think that this is too favourable for it would appear from the cases that a breach of duty owed to the Court committed by gross negligence may lead to the exercise of punitive jurisdiction. But in the present case it is right to accept the test laid down by the learned judge and ascertain whether by that standard misconduct was proved. I have had the opportunity of considering the survey of the facts made by the noble Viscount and by Lord Wright, and as I agree with their statement and with the conclusions they draw I find it unnecessary to discuss the evidence at any length. The question is confined to the matter of discovery of documents. It is a subject which undoubtedly often presents difficulties to a solicitor, who in quite ordinary disputes finds it difficult to convince his client that business documents, as well as documents which the client considers private and confidential, must be disclosed.

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(1) 11 C. B. 457.

(2) (1856) 1 C. B. (N. S.) 151.

The difficulty is increased where the case involves a charge of dishonesty against the client, who may have every motive for concealing some at any rate of the relevant documents. What is the duty of the solicitor? He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution. I am myself satisfied that the judge had ample evidence on which to find that Mr. Osborn, in allowing the two earlier affidavits to be sworn and put on the file, was allowing something to be done which he knew to be wrong. In the discussion before us little was said about Nathaniel Rothfield's first affidavit which was filed on March 1, 1937, the same day as Henry Rothfield's and about fourteen weeks after the latter had been arrested on charges of fraud. In the August before Mr. Elman had had handed to him by Henry the documents passing between Mrs. Myers, the plaintiff in the case, and Horwood & Co., for whom Henry was at any rate ostensibly manager. We know now that the worthless Canadian gold shares supplied to Mrs. Myers had been purchased through Nathaniel, and that most of the proceeds of the valuable shares of which she had been defrauded had been paid into Nathaniel's account. It seems almost certain that such reasonable inquiries addressed to Henry as through whom were the gold shares bought, how were they paid for, how were the valuable shares sold, where did the proceeds go, would either have elicited the truth, or would have satisfied the solicitor that concealment was being practised, and that the solicitor could not honestly continue. But in regard to the second affidavit of Nathaniel filed on May 29, the facts as found by the learned judge in the documents disclosed in relation to it appear to me conclusive of the misconduct of Mr. Osborn. The issue turns upon the disclosure by Nathaniel of his pass-book at Lloyds Bank in the Strand. It is described in the First Schedule, Part I., as "Pass-book, Lloyds Bank, Ld., 222, Strand, W.C.2, "relevant entries only." At the time when the affidavit was sworn and filed the pass book had not been produced to the solicitor, no entries had been identified as the relevant entries, no part had been sealed up. The book itself, or rather the sheets, were not taken by Nathaniel to Mr. Osborn according to the latter's account until the morning of June 8, the day upon which the plaintiff's solicitors were attending for inspection, and on that day Mr. Osborn, who had the sheets in his possession, directed his typist to seal up all the portions of the sheets except those which had been marked as relevant by Nathaniel himself. This procedure in itself seems to me highly irregular. By such a proceeding no oath is taken by the party defining what is relevant, or therefore defining that which he may have in his possession but swears to be irrelevant, and as far as the solicitor himself is concerned it would be a grave breach of duty to leave the decision as to relevance to the oath of a boy just come of age who with his family was charged with fraud, and who obviously had been guilty of a misstatement in his first affidavit. But the charge is established by two facts ; first the judge's finding that he does not accept Mr. Osborn's statement that he did not see the whole contents of the pass-book ; secondly, by Mr. Osborn's admission, which was obviously correct, that any experienced person who saw the whole pass-book and the large amount of receipts, 54,000*l.* in about twelve months, would recognize that the whole pass-book was relevant. On the judge's finding, with which I entirely agree, Mr. Osborn must have seen the whole book ; if so, he allowed the affidavit to take the form of having sworn to only a few relevant entries and not to the whole.

It may be mentioned that apart from this an inspection of an alleged account between Horwood & Co. and Nathaniel which was in fact disclosed reveals payments and receipts in addition to those actually disclosed, some of which undoubtedly appeared in the pass-book and were thus in that document concealed. I need only refer to one item, the sale of 2500*l.* 3½ per cent. War Loan, which is entered in the pass-book under August 14, 1937, the receipt of which from Horwood & Co. is entered in the Horwood account a day or two previously. There are others equally relevant. I do not go into detail as to the correspondence, but I am also satisfied that the letters passing between the solicitors, and the proceedings on the various summonses for further discovery well warrant the judge's finding that in resisting further discovery the solicitor was obstructing the interests of justice, adding to the difficulties of the plaintiff, and causing delay where a speedy judgment was of great importance to the plaintiff. In coming to the conclusion that the appeal should be dismissed I have tried to bear in mind the difficulties into which an honest member of the profession is put when he has to defend a client charged with dishonesty or any other crime. He is not to arrogate to himself the ultimate decision which is to be the judge's. He may be suspicious, but his suspicions may be misplaced. Every one has a right to have his defence put before the Court. But in such cases it is specially incumbent upon solicitor and counsel alike to observe their obligations to the Court. As Dr. Johnson said, they are not to tell what they know to be a lie. It is because the rule of conduct was in this case gravely broken that I think that the salutary decision of Singleton J. should be restored.

LORD RUSSELL OF KILLOWEN. My Lords, assuming that the judge has rightly found that Mr. Osborn knowingly filed false affidavits of documents, the Court was, in my opinion, entitled in the exercise of its jurisdiction over its officers, to order Mr. Elman, who was the solicitor on the record for the deponent and who acted by Mr. Osborn as such solicitor, to pay such amount of the plaintiff's costs as the Court deemed proper. It is, I think, immaterial that no professional misconduct is attributable to Mr. Elman personally. He would none the less have failed in the discharge of the duty which he owed to the Court. I agree in all respects upon this point with the opinion of Viscount Maugham, which I have had the privilege of reading.

Nevertheless, I would dismiss this appeal, because although I differ from the reasons upon which the order of the Court of Appeal is founded, I am of opinion that upon the evidence before us, it is impossible to hold that any of the charges alleged against Mr. Osborn have been proved. If this view is correct, an order against Mr. Elman could not stand, for a fortiori no charge has been proved as against him.

Let me first state what were the charges which Mr. Elman was called upon to meet, and in regard to which his case and the evidence in support of it were presented at the hearing before Singleton J. It is essential to appreciate what the exact charges were, because the proceedings which were based upon them are in their nature penal, and the respondent was in the position of a person accused. In these circumstances the accuser must be confined to the actual charges made, and it is not open to the tribunal to find that other charges are proved, and to impose a punishment accordingly. Nor was any notice ever given that other and additional charges would be made or considered. The actual charges which Mr. Elman was called upon to meet are clearly defined by the particulars. They were two in number, which I quote verbatim—namely: (1.) "Mr. Burnett L. Elman instructed "counsel to draw and then filed defences which were to his "knowledge false in respect of each and both of his clients, "persisting in such conduct of the defence of these defendants "notwithstanding that his client Henry Isaac Rothfield had "been convicted and sentenced to penal servitude for the "frauds, the subject of the plaintiff's claim"; and (2.) "In "the light of the knowledge which the respective solicitors had "of the business conducted by their clients and of the position "and relationship of their clients and of the existence of "material documents which were or had been in the power, "possession or control of their several and respective clients, "each of the solicitors were (*sic*) guilty of misconduct in "preparing and advising or permitting their clients to make "and file affidavits of documents which were wholly inadequate "and obviously false." The first charge I will allude to no more. The judge found no misconduct under that head. The second charge may, I think, be summarized as a charge of knowingly filing false affidavits of documents. That is the accusation; that and nothing else. But even as to this charge it has, upon the judge's findings, been confined before your Lordships' House to a charge in relation to the affidavits of documents sworn by Nathaniel Rothfield. The judge makes no specific finding in relation to Henry Rothfield's affidavits, nor was any case in respect of them opened before us. They are not even included in the books before us, and I have never seen them.

To understand with accuracy what the judge decided it is necessary to read his judgment with some care, because the findings of fact are not formally or consecutively stated. They have to be picked out here and there. I will now state these findings and make my comments upon them.

1. The first finding is in relation to Mr. Osborn's knowledge of the contents of the pass-book relating to Nathaniel's account with Lloyds Bank. Mr. Osborn's evidence was to the following effect: that it came into his possession for the first time on June 8, 1937, that Nathaniel brought it to the office and told Mr. Osborn that he had marked the only relevant entries, that he, Mr. Osborn, did not examine it because he had to leave the office to keep another appointment and had therefore no time to examine it, but that since the plaintiff's solicitors were due to come and inspect documents at noon, he handed the pass-book to a clerk with instructions to cover or seal up the unmarked entries. That was the only evidence upon this point, except that of the clerk who covered up the unmarked entries and who corroborated the instructions given to her. The judge's finding was this: " I cannot accept "the explanation given to me by Mr. Osborn . . . . I feel "sure that he examined the pass-book when it was handed "to him. Even a cursory examination of it must have satisfied "him how damaging it was to Nathaniel Rothfield's case, "and acting on the client's instructions he determined to "keep it back as long as he could, adopting the attitude "shown by the letter of June 26, 1937, which I have already "read." My Lords, I have read and re-read the evidence in this case and I can find nothing to support such a finding. I am in the dark as to the reason for the judge disbelieving Mr. Osborn's explanation. The shorthand notes afford no clue. But if the only witness to a material fact swears "Yes," and the judge elects to disbelieve him, " No " is not thereby proved. There is still no evidence that Mr. Osborn did on that occasion examine the pass-book, which I may observe consisted of thirty-six pages. Still less is there any evidence of any instructions to Mr. Osborn to keep back the pass-book, or of any determination by Mr. Osborn to keep it back; and as to the letter of June 26, 1937, I can see nothing wrong in its contents. Indeed the plaintiff's solicitors never replied to

it, and made no further move in relation to discovery until some four months had elapsed. I am of opinion that this finding is without any justification. But in addition to this, the finding is irrelevant to the charge, for even if it were true, any knowledge acquired by Mr. Osborn in June, 1937, and any determination then formed to keep back the pass-book, could only establish the known falsity of an affidavit by Nathaniel subsequently filed—namely, Nathaniel's third affidavit which was sworn and filed on November 30, 1937. But, of this affidavit no complaint is made. By it, the whole pass-book was disclosed.

2. Later in his judgment the learned judge, referring to this disclosure, says: "The failure to disclose the accounts, "Lloyds Bank account in particular, at the proper time, "added to the plaintiff's difficulties, added to the expense, "and entailed delay. I am satisfied that it was a deliberate "policy adopted in the office of Mr. Elman." That is indeed a grave charge; but for myself I see no trace in the documents or evidence of any such policy, deliberate or otherwise; and no such charge is included in the indictment.

3. The learned judge also finds that the order for the third affidavit of Nathaniel was made notwithstanding the opposition of Mr. Osborn, and that in resisting discovery of the Lloyds Banking account, the solicitor was obstructing justice. He adds: "He—when I say 'he' I mean either the solicitor "or his managing clerk, or both—knew the relevance of the "banking account and the importance of it. He held it "up as long as he could merely on the request of his client "Nathaniel." That Mr. Osborn knew the relevance of the Lloyds Banking account when the order for the third affidavit was made is not in dispute; but there is no justification for the statement that the order was opposed. There is no evidence to that effect at all. It is the other way. Nor can I discover any foundation for the suggestion that the banking account was held up on the request of Nathaniel. I need not repeat the criticism of the irrelevance of such a finding in relation to the charge as regards the third affidavit.

4. The only finding of the learned judge which is strictly

relevant to the charge made runs thus: "In allowing the "two earlier affidavits to be sworn and put on the file, I "believe the solicitor was allowing something to be done "which he knew to be wrong." This I understand to be a finding that Mr. Osborn knew that Nathaniel's first two affidavits were false; but it is a finding which appears to me to have no foundation on the evidence. I have read the correspondence between Mr. Osborn and Nathaniel and the evidence of Mr. Osborn, and I find nothing therein to justify a charge of this nature. The letters written by Mr. Osborn in the name of the firm appear to me proper in all respects.

My Lords, I have an uneasy feeling that the judge may, in arriving at his findings of fact, have unconsciously transferred to a solicitor and his clerk the prejudice which properly attached to the rogues for whom they were acting, with the result that he has found Mr. Osborn guilty of conduct which was neither alleged nor proved. In my opinion the only charge with which this House was concerned was unsupported by any evidence and this appeal should be dismissed accordingly.

LORD WRIGHT. My Lords, the Court of Appeal, by a majority consisting of Greer and Slesser L.JJ. (MacKinnon L.J. dissenting) reversed the decision of Singleton J., who by way of exercising the summary jurisdiction which the Court has over solicitors as officers of the Court, had directed payment to the appellant, the plaintiff in the action, of one-third of her costs of the action and two-thirds of the costs of the application in pursuance of which the order was made. The respondent had acted as solicitor for Nathaniel Rothfield, one of the defendants in the action. The judge made the order because he found that the respondent or his clerk had been guilty of professional misconduct in regard to discovery in the action. The Court of Appeal overruled his decision because they held that misconduct was not established against the respondent personally, but only, if at all, against his clerk, and that the punitive powers of the Court could only be exercised when the solicitor was guilty personally of misconduct. It is not clear whether they accepted that the evidence showed the deliberate obstruction to complete discovery on the part at least of the solicitor's clerk which the judge found as a fact. Before this House, the respondent sought to support the judgment of the Court of Appeal not only on the ground of law on which it was based, but on the ground that the judge's finding of fact that there was professional misconduct was not justified by the evidence. The House has accordingly heard an elaborate examination of the evidence before the learned judge.

The crucial issue in these proceedings concerns the conduct of the solicitor, or his clerk, in regard to discovery. It will be convenient to give a meagre, but I hope sufficient, outline of the general facts of the case. The appellant, Mrs. Myers, who was plaintiff in the action, brought her action against a number of defendants, Norman Baron Rothfield, Henry Isaac Rothfield, Nathaniel Rothfield, Rothies (sued as a firm) and Horwood & Co. (sued as a firm). The writ was issued on November 3, 1936, and claimed 9560*l.* 2*s.* as money had and received by the defendants to the use of the plaintiff, or in the alternative damages for conspiracy and fraud. The allegations of the statement of claim were established at the trial, and the defendants, including Nathaniel Rothfield, were found guilty of conspiracy. The story was of a character unfortunately too common. The world is left uncertain whether to wonder more at the greed or the credulity of the victims. Mrs. Myers received a circular as from Horwood & Co., inviting her to invest in what was called an Empire Produce Pool, which was to produce without any risk about 12½ per cent. for three months, both capital and profit being guaranteed. She sent 50*l.* as the purchase price of five units of 10*l.* each in the Pool. This was on June 10, 1936. There was, of course, no pool, but a month or so later she was informed that the profits were 6*l.* 10*s.* She was persuaded then by Horwoods to buy fifty-six shares in Consolidated Gold Alluvials, Ld., at 20*s.* a share, which Horwoods represented would soon be worth 2*l.* or 3*l.* a share. That would use up 56*l.*, leaving 10*s.* which was sent to her in settlement. This was the bait. She was next entertained at lunch at the Savoy Restaurant by "Horwood," who turned out later to have been Henry I. Rothfield, and was in the end induced to buy 7500 shares in the Gold Company at the same price. She had not the money to pay for them, but was pursuaded to deposit a number of valuable shares which she possessed, together with transfers in blank, to be used, so H. I. Rothfield said, to obtain a loan of the necessary cash to purchase the Gold Company's shares. The profits were to be realized in less than a month; the shares would then, it was said, be released from the charge and she would get the balance of the profits. Nothing could be simpler or more attractive. Unfortunately there were no profits, the gold shares were worthless, and the blank transfers given by the appellant were used by Rothfield in order to sell her shares, and convert the sums so realized. The appellant seems to have soon become suspicious, or at least to have disclosed what she had done to her husband or friends.

Her solicitors at once wrote to the Birmingham brokers who had put through the sale of the shares, explaining what had happened. The brokers applied to Horwood & Co., at their offices they saw H. I. Rothfield, who at once consulted the respondent by telephone. The respondent was thus put in touch with the brokers' solicitors and had the file of papers sent to him for examination. On August 20, 1936, he had a full discussion with the brokers' solicitors. On November 3, 1936, the writ was issued, the statement of claim being delivered with it. On March 11, 1938, after trial before Singleton J. and a special jury, judgment was entered for the plaintiff against all the defendants for 9400*l.* 16*s.* 1*d.* and costs. The trial was delayed largely owing to the obstructive policy in regard to discovery pursued by Nathaniel Rothfield. Nothing has been realized on the judgment.

Henry Isaac Rothfield, father of Norman B. and Nathaniel Rothfield, was at all material times an undischarged bankrupt. Nathaniel Rothfield was, at the date of the writ, an infant, but came of age on May 17, 1937, when he adopted the defence filed on his behalf by the respondent who was acting at that stage of the action both for Nathaniel and his father.

The respondent also acted for H. I. and Nathaniel Rothfield in an action brought in May, 1936, by Lady Chichele-Plowden, in which similar frauds were alleged, but it was never brought to trial. In yet another action of the same type, *Still* v. *Morser and Others*, he entered appearance, and delivered a defence on behalf of H. I. Rothfield, who was one of the defendants, though at a later date another solicitor, Mr. Garber, took over his defence in that action. On November 13, 1936, H. I. Rothfield was arrested on charges of fraud in connection with the sale of Consolidated Gold Alluvial shares, including the transactions with the appellant. The respondent at first acted for him in these proceedings, but was replaced by another solicitor before the date of the trial, which was in September, 1937, when Rothfield was convicted and sentenced to four years' penal servitude. I think it is clearly established that the respondent was at all material times aware that Horwood & Co., though one Morser was up to a certain date registered as proprietor under the Business Names Act, was in fact the business of H. I. Rothfield and was merely a name or cover which he used for his dealings. I need not here detail my reasons for this conclusion, or refer to the numerous third-party proceedings brought by Morser against the Rothfields in which the respondent acted for the latter in the various actions brought against Morser alleging frauds such as those in the *Still* v. *Morser* action or the appellant's action. Morser had in fact obtained a letter of indemnity from Rothfield. The respondent seems to have been on terms of some intimacy with H. I. Rothfield, whom in one letter he addresses as "Dear Henry." It appeared that during the material period large sums of money passed to him from Nathaniel Rothfield.

I think this brief and far from complete outline is sufficient to indicate the complicated web of affairs in which the respondent acted for the Rothfields, including Nathaniel, who has been established as a co-conspirator. It also shows how important discovery was in order to elicit the relationship of the different defendants, so as to establish the conspiracy and if possible trace what had happened to the proceeds of

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the frauds, a large portion at least of which, it is now established, passed through Nathaniel Rothfield's bank account. The disclosure of bank books and of accounts was in this respect particularly vital. In fact, as will appear, there was no proper disclosure until after two orders for further discovery had been made, and until after the third affidavit was sworn, which was not till November 30, 1937, the order for directions providing for an affidavit of documents within ten days having been made as far back as January, 1937. The documents disclosed under Nathaniel Rothfield's third affidavit, in particular his pass-books, showed clearly enough that he had been receiving large sums of money, about 54,000*l.* in all over a period of about twelve months, including many payments from Horwood & Co. It also disclosed documents showing purchases of the Gold Alluvial shares as well as other dealings with that firm. There could be no possible doubt of Nathaniel Rothfield's complicity in the fraud as soon as this discovery was made. But when at last the case came on for trial and judgment was obtained, the cupboard was bare. Nathaniel Rothfield did not appear at the trial.

After judgment was given, an application was made to Singleton J. to exercise the summary jurisdiction of the Court over the respondent as a solicitor and officer of the Court in respect of his professional conduct in the case. A similar application was made in respect of the solicitors for the other defendants, but as this failed I do not discuss it further.

The application was based on two separate grounds. The first was that the respondent had filed and persisted in a defence which he knew or had reason to think was false. Singleton J. rejected the application so far as based on this ground and I agree with what he has said. There may indeed be circumstances in which a legal adviser has taken such action or so comported himself on behalf of a client as to go further than an honest advocate or solicitor could properly go. It is difficult and perhaps impossible to formulate any principle which would afford a general definition applicable to such cases. Singleton J. wisely said: " Nothing ought to "be said which may prevent or tend to prevent solicitor or "counsel from doing his best for his client so long as his duty "to the Court is borne in mind." A client is entitled to have legal aid in order to put the other side to proof of the case against him, and to test and probe that case and the evidence adduced. Thus the client is entitled to say that he denies the fraud or other matters charged and to have that defence placed on the record. He is entitled to have professional aid in regard to the maintenance of that defence before and at the trial and to plead matters in mitigation and in regard to questions of damage. Whatever knowledge or suspicion the respondent may have had of the Rothfields, he did not overpass the limits fixed by his duty as an officer of the Court merely in filing or persisting in the defences. I agree with the opinion of Singleton J. that it is not sufficient evidence of misconduct, taken by itself, that a solicitor continued to act in the action notwithstanding that he was aware or was put on inquiry that the defendants were or might be raising false issues in it. The judge's decision on this matter was not questioned in this House.

The second complaint raised in the appellant's application had reference to discovery. The general effect of the complaint as stated in the application and so far as here material was that the respondent was guilty of misconduct, in the light of what he knew or might reasonably suspect of his client's business and of his relationship to the other defendants and of the existence of material documents, in preparing and advising or permitting Nathaniel Rothfield to make and file affidavits of documents which were wholly inadequate and as he knew or was put on inquiry were untrue. On this head of complaint, Singleton J. decided against the respondent. He held that the original failure to disclose the accounts was a deliberate policy adopted in the respondent's office; that the respondent had held up discovery as long as he could merely on the request of his client, Nathaniel Rothfield. "His duty," the judge said, "was to see that it [the banking "account] was disclosed, and if the client persisted in his "refusal the solicitor ought to have declined to act further

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"for him. A solicitor is an officer of the Court and owes a "duty to the Court; he is a helper in the administration of "justice. He owes a duty to his client, but if he is asked "or required by his client to do something which is inconsistent with his duty to the Court, it is for him to point out "that he cannot do it and, if necessary, to cease to act." In holding that in regard to discovery there was misconduct in a professional sense, he drew no distinction between the respondent and the managing clerk, for whom he was responsible, though he said, having heard the evidence of both, that both knew a good deal about the matters in question. I think the judge meant that he drew no distinction either in fact or in law between them. Indeed he was not asked to do so. The point on which his decision was reversed by the Court of Appeal was not raised before him. It was not raised until the hearing in that Court; similarly the point that the judge's decision was not justified by the evidence was not raised until the appeal to this House.

In order to deal with the point of law decided by the Court of Appeal, it is necessary to explain briefly the nature of the jurisdiction of the Court which the appellant invoked. A solicitor (or in former days a solicitor or an attorney) was long ago held to be an officer of the Court on the Roll of which he was entered and as such to be subject to the discipline of that Court. The Court might strike him off the Roll or suspend him; for instance, the Court of Chancery might strike a solicitor off the Roll of the Court, and order a communication of that order to be made to the Courts in Westminster Hall. There are many such instances in the books. By the Solicitors Act, 1888, there was established the Disciplinary Committee appointed by the Master of the Rolls from members or past members of the Council of the Law Society. This Committee was charged with the duty of investigating complaints against solicitors and reporting their decision to the Court, which could then, if so minded, strike the solicitor off the Roll or suspend him. It was not until 1919 that by the Solicitors Act of that year, the Disciplinary Committee was itself given power to strike off the Roll or to suspend or to order payment of costs by the solicitor subject to an appeal to the Court. But the jurisdiction of the Master of the Rolls and any judge of the High Court over solicitors was expressly preserved, as it now is by s. 5, sub-s. 1, of the Solicitors Act, 1932. Whether the Court would now entertain an application to strike a solicitor off the Roll or to suspend him instead of leaving the matter to the Disciplinary Committee may be doubted. But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed. It was clearly preserved to the Court by s. 5, sub-s. 1, quoted above. It was a summary jurisdiction, in which the intervention of the judge was invoked at the conclusion of the case either by motion in the Chancery Court or by a motion or application for a rule in the Courts of Common Law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.

The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the Courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in *Stephens* v. *Hill.* (1) The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.

I do not seek to recapitulate the authorities. But as it has been held by the Court of Appeal that in this jurisdiction a solicitor is not liable to be penalized for the conduct of his agent, partner or clerk, I must refer to a few of the cases in which the contrary has been held. The justification for the rule embodied in these decisions may be that the jurisdiction is compensatory as well as penal, and that the solicitor may fairly be held answerable to make good losses caused by the

(1) (1842) 10 M. & W. 28.

act of an agent whom he has left to fulfil his duty, and though a solicitor may leave much to his qualified and experienced assistants, he sometimes may be held answerable on the ground of his failure to exercise proper supervision. In *Norton* v. *Cooper. In re Manby and Hawksford* (1) Stuart V.-C. puts the rule on a positive basis. He said: " The safety of the public and "the rules of Court are to be satisfied only by holding, in a "case of this kind, that as long as Mr. Hawksford continued "to appear as one of the solicitors of the plaintiff on the records "of the Court, he is responsible for what took place in the "conduct of the cause." Mr. Hawksford was not personally implicated; the fault was that of a partner who had used the name of the official assignee to bring an action against a mortgagee. Each individual partner was, it was held, prima facie liable for the misconduct, and was ordered to indemnify the official assignee against his costs. In *Blundell* v. *Blundell* (2) the defendant's attorney was personally ordered to pay the plaintiff's attorney his costs of opposing bail, where there had been a misrepresentation as to the respectability of the bail by the managing clerk of the defendant's attorney, though the latter was not privy to the misconduct. The Court of Appeal in the present case referred to two authorities in order to distinguish them. One was *Dunkley* v. *Farris* (3) where the solicitor's clerk had forged the Court's seal on a writ. The plaintiff's solicitor was ordered personally to repay the excessive costs of the proceedings and the costs of the rule, though no blame was imputed to him. The Court held there that he was so far implicated as to make him responsible as what was done was done in his office. The Court of Appeal distinguished that case, as I understand them, on the ground that it was not a case based on misconduct by the solicitor. With great respect I cannot agree. I cannot see how the personal order that was made there against the solicitor could be justified except as made under the summary jurisdiction of the Court. Greer L.J. explains the decision as one depending on the lack of authority of the solicitor to act for the party

(1) 3 Sm. & G. 375, 385.
(2) (1822) 5 B. & Ald. 533.
(3) 11 C. B. 457.

named on the writ and states that it depends on the doctrine of a breach of warranty of authority. It may be that in such cases an action might now be brought on that comparatively modern doctrine, but in *Dunkley* v. *Farris* (1) the Court was exercising clearly, as it seems to me, its summary jurisdiction. Its order was not based on any privity or breach of actual or imputed authority. The ground was that the solicitor had committed a breach of his duty to the Court. It has been said that it is the duty of the solicitor to make himself certain on the point of having a retainer before he issues a writ. The case presented merely a special instance of improper conduct. This is true also of *In re Eyre*. *Palmer* v. *Evans* (2), where the Court exercised its summary jurisdiction to order a solicitor to repay extortionate costs exacted by his clerk. There was improper conduct, though the solicitor was not personally implicated. Jervis C.J. thus sums up the position : "as it was done in his "office, and by a person for whom he is responsible, and as he "received the money, I think he is so far implicated as to "make him responsible." It is no doubt true that a solicitor will not be struck off the Rolls or suspended, unless he is personally implicated, but with the greatest respect I can find neither reason nor authority for the view of the Court of Appeal that the discretionary and remedial jurisdiction of the Court to order reimbursement of costs or expenses thrown away owing to his improper conduct in a case cannot be exercised unless the solicitor is personally implicated. I agree on this point with the judgment of MacKinnon L.J., who upheld Singleton J.

I do not refer to any others of the numerous cases which illustrate the scope and variety of the jurisdiction, except to two which specifically refer to false affidavits. One is *In re James Gray* (3) which was a case where a solicitor had allowed a client to make an affidavit in which he swore to a false date known to both parties to be false. Lord Romilly, in ordering the solicitor to be suspended, said that it was impossible for the Court to proceed with safety were it not that the solicitors connected with the Court should most carefully investigate, and as far as possible correct, such statements of their clients as to dates. Similarly in *In re Davies* (1) the Court of Appeal suspended a solicitor for two years because (inter alia) he had allowed a client to swear an affidavit which both he and the client knew to be false. He had warned her it would be untrue but she insisted on swearing it. The Court said that he should have withdrawn from the case. These authorities, in so far as they relate to affidavits, have special relevance to this case where Nathaniel Rothfield is held to have sworn affidavits of discovery which were false and where the solicitor (which is the term which I shall use hereafter to include either the respondent or his managing clerk Osborn, to whom to a large extent he left the conduct of the discovery) should not have allowed them to be sworn if he had done the duty which he owed to the Court. The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to. That is the improper conduct which the judge has found to have been committed by the solicitor in this case, in his findings of fact which I have summarized above.

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(1) 11 C. B. 457.

(2) 1 C. B. (N. S.) 151.

(3) (1869) 20 L. T. 730.

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(1) (1898) 14 Times L. R. 332.

In my opinion these findings were fully justified. The first affidavit sworn by Nathaniel Rothfield was a mere travesty of discovery. It contained in the First Schedule, Part I., nothing but letters between solicitors after action brought and the proceedings common to both parties. This elicited a very proper letter from the appellant's solicitors, in which they said, after referring to the character of the action, that it must be clear that a large number of relevant documents had not been disclosed and suggested that the solicitor should explain to his client the meaning and importance of the affidavit with a view to filing a further and better affidavit. This letter produced no effective result. The solicitor was satisfied with the mere denial of Nathaniel Rothfield. An application for a further and better affidavit was successfully opposed before the Master. The judge in chambers, however, reversed the decision of the Master and on April 23, 1937, ordered a further affidavit to be sworn by Nathaniel Rothfield. It was not until May 29, 1937, that under that order the second affidavit was sworn, after repeated and urgent complaints of delay. Inspection was given on June 8, 1937. What happened in this connection is most significant. The affidavit included in the schedule Nathaniel Rothfield's pass-book at Lloyds, 222, Strand, "relevant entries only." In the circumstances of the case, the irregular description "relevant entries only" should have roused the interest of the solicitor, unless he had actually prepared it. The entries disclosed in this way were about thirty in number. Some were marked with an asterisk, others had lines drawn in the margin against them. The rest of the account was sealed up. It is now clear that the entries disclosed had been selected with some skill, as dealing with receipts to, or payments by, the client, already disclosed in the discovery given by other defendants. But the entries disclosed would have been seen to be most inadequate if the slightest examination of the pass-book had been made. No one disputes now the truth of this. The solicitor admits that he must have seen the incompleteness of the discovery if he had looked at the pass-book. This part of the case rests on the evidence of Osborn, the clerk, as the respondent was away from the office about that time owing to illness. Osborn seeks to excuse this manifest breach of duty, on the ground that the pass-book was not brought into the office until just before the time fixed for the appellant's solicitor to come to inspect, that he had no opportunity to examine the book, that he simply sent it to a typist to seal all the entries except those which were marked as being relevant. He said in evidence that he did not even look at the pass-book afterwards when it was left some days in his office and he could have done so. Singleton J., after hearing Osborn's evidence and after asking him a number of questions, said that he felt sure that Osborn did examine the pass-book when it was handed to him. "Even a cursory examination of "it must have satisfied him how damaging it was to Nathaniel "Rothfield's case, and acting on his client's instructions he "determined to keep it back as long as he could." This finding of the learned judge has been strenuously attacked on the ground that it is not based on evidence, that it is mere speculation and not inference. It has been argued that the judge was not entitled to go behind the positive oath of Osborn that he did not examine the pass-book, because there is no direct evidence to the contrary. I am unable to accept this argument. The judge's view is not based on speculation, but is a matter of inference based on all the facts of the case, on the circumstantial evidence which according to ordinary experience and probability make it incredible that Osborn, placed as he was, did not look at the pass-book. Where there is a denial on oath of the charge by a party charged, and no direct evidence to the contrary, a judge or jury may in certain events be entitled to refuse to believe that denial, and to act upon the circumstantial evidence in the case. The same is true in a case like this. I think the judge was entitled to find as he did on all the evidence. But in my judgment, even if the judge were wrong in discrediting Osborn's evidence that he did not examine the pass-book because he accepted his client's word that it contained no relevant entries, the order which the judge made would still be justified. It would be a gross breach of duty to the Court in a matter of discovery like this for a solicitor to accept his client's bare word as to what was relevant, and not himself examine the documents, at least when regard is had to the general background of the case, and to all that the solicitor must have known of his client's character and surroundings. There is really a dilemma. Either Osborn examined the pass-book or he did not. If he did, he must have known that the affidavit was false. If he did not he committed a gross breach of duty. He had no right to leave discovery to the decision of the client. In fact when the appellant's solicitors wrote pointing out that it was quite clear that there were material entries in the pass-book other than those disclosed, the solicitor still did no more than pass on the complaint to the client, and the appellant's solicitors were compelled to make a further application to the Court, which on November 18, 1937, ordered Nathaniel Rothfield to disclose the items sealed up in the Lloyds' pass-book and in the pass-book of another bank account which he had, as well as to make a further and better affidavit. The third affidavit, which has been accepted as satisfactory, was eventually sworn under that order. Eventually after further delays the case was heard and judgment entered for the appellant against all the defendants on March 11, 1937. It is clear that the difficulties about discovery had increased the costs and so delayed the trial as to diminish or destroy any chance of recovering the fruits of the judgment.

In my opinion, the order of Singleton J. was right and should be restored.

LORD PORTER. My Lords, I agree that this appeal should be allowed. The facts have already been stated but a restatement is, I think, necessary in order to make my views intelligible.

The respondent is a solicitor who was retained in an action in the High Court of Justice entitled M. No. 3522, *Stella Constance Myers* v. *Norman Baron Rothfield, Henry Isaac Rothfield, Nathaniel Rothefield, Rothies* (sued as a firm) *and Horwood & Co.* (sued as a firm). In that action he represented Henry Isaac Rothfield and Nathaniel Rothfield. Of these defendants Henry Isaac Rothfield, who was the father of Norman Baron Rothfield and Nathaniel Rothfield, was an undischarged bankrupt, and Nathaniel at the time of the issue of the writ was an infant. The firm of Rothies was in fact Norman Baron Rothfield and the firm of Horwood & Co., which purported to be stock and share brokers was completely under the control of Henry Isaac Rothfield, though one Morser was registered as the owner under the Business Names Act and was retained as a nominal figurehead.

It is plain from the findings of the jury that the three Rothfields were engaged in carrying on a systematic swindle, using the firm of Horwood & Co. for that purpose. The method employed was to invite investors to engage in a produce pool by subscribing for 10*l.* units. They were then informed that the pool had been a success, that they were entitled to considerable profits, and by this means were afterwards persuaded to sell or to hand over to Horwood & Co. for sale, such investments as they could be induced to part with and to buy with the proceeds of such sales worthless shares in a company called Consolidated Gold Alluvials, Ld.; shares which in due course were, or purported to be, transferred to the victims of the swindle. Amongst others who were so defrauded was the appellant Mrs. Myers, who between July 9 and 15, 1936, handed over cash and shares to the value, as the jury found, of 9560*l.* In her case that sum was not even invested or re-invested in the shares of Consolidated Gold Alluvials, Ld., though the money with which she parted had in the main been obtained by representing that she would be wise to purchase such shares, which would shortly show a large profit.

This was not the first occasion on which the respondent's firm had acted for Henry Isaac and Nathaniel Rothfield. On December 12, 1935, he had been instrumental in incorporating a company known first as Mushroom and Fruit Growers' Association, Ld., and later as Mushroom Farmers' Association, Ld., a private company which was formed by Nathaniel Rothfield and of which he was the sole director.

Before the issue of the writ in this action he had also invested a sum of between 3000*l.* and 4000*l.* on behalf of the same defendant, whom he knew to be an infant. So far as Henry Isaac Rothfield is concerned he knew him to be an undischarged bankrupt and, as he said, believed him to be the manager of the firm of Horwood & Co. which he had been instructed to transfer from Mr. Horwood to Mr. Morser on March 8, 1935. These matters were within Mr. Elman's personal knowledge, but in litigation, as he alleged, he was represented by his clerk, Mr. Osborn, and it is clear that many, at any rate, of the details of litigation were conducted by this clerk, inasmuch as Mr. Elman during a considerable portion of the period material to the present action was ill and unable to attend at his office.

Just before Mrs. Myers had parted with her securities a writ had been issued by Lady Mary Chichele-Plowden against one Thomas Livingstone and against Henry Isaac and Nathaniel Rothfield in which she alleged that she had been fraudulently induced to hand over valuable securities for shares in Consolidated Gold Alluvials, Ld. The allegations of fraud were similar to those which were afterwards alleged in the Myers case.

In the Chichele-Plowden case the writ was issued on June 19, the statement of claim delivered on June 26, and appearance was entered for the defendants the two Rothfields by the respondent, and defences were delivered on August 7, denying the allegations in the statement of claim.

Again, on July 31, just after Mrs. Myers had parted with her securities, one William Henry Still issued a writ against Henry Morser, one MacArthur and one Horwood, alleging similar frauds and Mr. Elman appears originally to have entered appearance for Mr. Morser, but later another solicitor represented him. Eventually Henry Isaac Rothfield was substituted as defendant instead of Horwood, and Morser instituted third-party proceedings against both Henry Isaac and Nathaniel Rothfield. In both Henry Isaac Rothfield's defence and in the third-party proceedings the respondent acted for the defendants. No doubt the details of these matters were attended to by Mr. Osborn, though Mr. Elman would, as he said, know generally that the action had been brought and that allegations of fraud had been made against his clients.

Whilst these actions were in progress Mrs. Myers appears to have realized that she had been defrauded and to have confided in her husband. He thereupon consulted his solicitors and they in turn communicated with certain Birmingham brokers, who had been employed to sell some of Mrs. Myers' shares, pointing out that the sale was made without Mrs. Myers' authority. The brokers through their solicitors wrote to Messrs. Horwood & Co. asking for an explanation. In answer to this letter the solicitors were invited to call upon Messrs. Horwood & Co., and their agents did visit that firm. As a result of the interview they were referred to the respondent, and three files of documents relating to the Myers transactions were sent to him with instructions to see the brokers and to give them all possible facilities to investigate the matter. From one of these letters, dated July 29, 1936, it was apparent that Mrs. Myers thought Henry Isaac Rothfield was Mr. Horwood. Mr. Elman did see the brokers' solicitors on August 20, and read over to them the documents which he had received and at their request these documents were afterwards copied and sent to them.

During the month of September further steps were taken in the Still action, and Morser was arrested at Nottingham for fraud, but afterwards discharged on the ground that he was merely the nominal head of Horwood & Co., whose business was really managed by Henry Isaac and Nathaniel Rothfield. It is fair to say that the respondent did not act for Morser in these proceedings and it was not proved that the details were known to him.

On November 3, the writ was issued in the Myers action, and on the 6th of that month Mr. Elman's firm entered appearance for Henry Isaac and Nathaniel Rothfield.

On November 13, Henry Isaac Rothfield was arrested for fraud, and on his first appearance before the magistrate was represented by Mr. Elman's firm and bail obtained for him. Thereafter, however, Mr. Elman ceased to act in the criminal proceedings. In fact Henry Isaac Rothfield was ultimately convicted and sentenced to four years' penal servitude for fraud, including the frauds on Lady Chichele-Plowden, Mr. Still and Mrs. Myers.

The statement of claim in the Myers action had been delivered with the writ, and the defence was delivered on December 12, 1936, but previously Messrs. Peacock and Goddard, in consenting to give further time for its delivery, wrote to Mr. Elman stating that the correspondence had already passed through his hands and ending with the observation: "You will doubtless "disclose the file of correspondence in your client's affidavit "of documents with the books relating to the business."

The defences when delivered denied any connection with Horwood & Co. on the part of Nathaniel Rothfield and a connection only as manager by Henry Isaac Rothfield, and in these circumstances the first affidavit of documents on behalf of the two defendants was delivered by Mr. Elman's firm on March 1, 1937. The affidavit of Nathaniel contained nothing save letters written after action brought. Neither the first nor a later affidavit of Henry Isaac Rothfield appears to have contained any of the letters or documents of Horwood & Co., but as those affidavits have not been inserted in the appendix it is not possible to determine what, if any, other documents were omitted. It is apparent that the learned judge who tried the case had before him both of these affidavits, but as they have not been inserted in the documents provided for the use of your Lordships' House, I do not propose to found any opinion upon them.

After the delivery of these affidavits the appellant's solicitors wrote to the respondent pointing out that neither the circulars issued by Horwood & Co., nor the banking account, books of account, or the correspondence between Horwood & Co. and its clients had been disclosed, and that neither Henry Isaac nor Nathaniel Rothfield had disclosed any documents relating to their connection with Horwood & Co. or any of their own banking accounts, and further that Mr. Morser had sworn he was merely a nominee of the three Rothfields. Mr. Elman's reply was that Henry Isaac had relinquished his managerial position with Horwood & Co., leaving the documents with that firm, and that Nathaniel had instructed him that he had nothing to do with the affairs of Horwood & Co.

On January 8, 1937, Mr. Morser in the Myers proceedings

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made the three Rothfields defendants to third-party proceedings. In the statement of claim in these proceedings he alleged that they were the real principals and set out three letters, dated respectively February 24 and March 25 and 26, 1936, which he said evidenced that an agreement whereby he should merely act as nominee of Henry Isaac and Nathaniel Rothfield had been come to at that time.

On March 13, 1937, these letters were sent to Mr. Elman's firm and he himself wrote to Henry Isaac Rothfield on the 15th of that month as follows:—

"Dear Henry,

"re Myers, Still, etc.,

"I find from certain correspondence which has been "supplied to me and which I have not heard of or seen "before that your position as between H. Morser and "yourself in the third-party proceedings and which proceedings are open and well known to the various plaintiffs, "will require very careful explanation.

"In order that you will understand my meaning I enclose "herewith copies of three letters and shall be glad to know "exactly how you are proposing to deal with it.

"Please treat the matter as urgent.

"Yours truly,
"Burnett L. Elman."

He said in evidence that when he received these letters he realized something was wrong. To this letter Henry Isaac Rothfield replied in effect that he had written the first letter in his son's name but without authority, that notwithstanding that letter he had continued to act as manager for Morser, and that the other two letters were evidence of that fact.

Being unable to obtain a further affidavit of documents without an order of the Court, the appellant's solicitors applied on March 18, 1937, to the Master, who ordered a further and better affidavit of documents by Henry Isaac Rothfield and Horwood & Co., but dismissed the application as far as concerned Norman Baron Rothfield and Nathaniel Rothfield. On April 23, 1937, however, the judge in Chambers ordered a further and better affidavit by the three last named parties.

On the same day Mr. Elman wrote to Nathaniel Rothfield asking immediately for all documents relating to the matter.

Mr. Osborn having, as he said, difficulty in getting proper discovery from Nathaniel Rothfield, took him to counsel's chambers and on that occasion certain sheets of his banking account at Lloyds Bank, Law Courts Branch, were produced. It was then explained to Nathaniel Rothfield that all relevant entries must be disclosed and he was told to go through the account carefully and disclose such items, but the decision as to what was relevant was left to him.

No further discovery had been made by May 24, and Messrs. Peacock and Goddard wrote again to Mr. Elman demanding full disclosure of relevant documents and pointing out the necessity for the disclosure and inspection of counterfoil cheque books, banking and pass-books, paying-in books or any other books of account, and sending an extract from a copy of the account of Horwood & Co. at Lloyds Bank, Holborn Circus, showing numerous payments therefrom to Rothfield and certain payments to Mr. Elman himself.

A further affidavit of Nathaniel Rothfield was sworn on May 29, 1937. It disclosed a large bundle of correspondence including matters dealing with the purchase of Consolidated Gold Alluvial Co. shares, and showed also an account between Nathaniel Rothfield and Horwood & Co. and his pass-book at Lloyds Bank, 222, Strand, "relevant entries only." The documents, when perused, showed that Nathaniel Rothfield had at least one other banking account, which had not been disclosed, but the main complaint with regard to the second affidavit is in regard to the items disclosed under the phrase "relevant entries only."

According to Mr. Osborn, the matter was dealt with in this way. The documents were not seen by him until just before the affidavit was sworn, so late indeed that there was not time to put them into proper chronological order in the affidavit. The pass-book, he says, did not reach him until the very morning for which inspection had been arranged, namely June 8, and on receiving that book he observed that Nathaniel Rothfield had marked either with an asterisk, a cross or by strokes the items that were to be disclosed. He says that he had not himself time to examine the book as he had another appointment, and he therefore instructed a clerk to cover up all items except those marked in the way described. He was not at all times clear as to the period during which the book was in his possession. In chief he said that he had the book from about the end of May until about the middle of June so far as he could recollect. On cross-examination he repeated the same allegation but on the hearing before your Lordships' House we were told that the book was not received until the morning of June 8 and in support of this allegation a letter of June 7 from Nathaniel Rothfield was produced.

The last date may be correct, but it does not appear what was the exact date at which the pass-book was taken away by Nathaniel. Mr. Osborn said that once the irrelevant items had been sealed up he did not see the book again, but he told Nathaniel to make sure there were no relevant items undisclosed.

The appellant's solicitors continued to press for further discovery and in the month of November Mr. Osborn, who said he was having difficulty in getting full discovery from Nathaniel, took him to see Mr. Elman himself. On that occasion Nathaniel informed Mr. Elman that he had six banking accounts, three however dealing with Mushroom Farmers, Ld., and two only being material. Four days later an order for a further affidavit of documents was obtained by the appellant's solicitors on November 18, 1937. A third affidavit was then sworn which gave full discovery and no complaint was made of it.

It is plain, however, from an inspection of the pass-book and the statement of account between Nathaniel Rothfield and Horwood & Co. that many items of importance were not disclosed in the second affidavit.

The case was ultimately tried before Singleton J. and a jury, and a verdict and judgment given against all the defendants for the full sum claimed and costs.

Before the trial Nathaniel Rothfield had sailed for the West Indies on the plea that he was suffering from a nervous breakdown, and an application was made to postpone the trial until

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his return. This application was supported by an affidavit by a doctor, and a short postponement was granted, but not such as to enable Nathaniel Rothfield to take part in the trial even if he desired to do so. The only party represented at the trial was Norman Baron Rothfield, against whom the jury also found a verdict.

At the end of the case Mr. Willes, as counsel for the appellant, applied that the several solicitors representing the various defendants should be ordered to pay the plaintiff's costs of the proceedings. On this application Singleton J. gave leave to apply to fix a time at which the application should be heard, and gave instructions that notice should be given to those concerned of the facts relied upon as justifying the application, so that they might have an opportunity of meeting the case made against them. Such notice was duly given and the particulars so far as Mr. Elman was concerned may be substantially summed up in the words of the learned judge in his judgment as (1.) the filing of defences which Mr. Elman knew to be false and persisting in those defences, and (2.) questions of discovery.

Singleton J. absolved the respondent from any liability on the first ground, his short reasoning, with which I agree, being that though a solicitor may suspect his clients, they are entitled to say, " I deny any fraud," to have that defence placed on the Record and the fraud proved, and that in any case the quantum of damages must be ascertained.

As to discovery, however, he found the respondent guilty of professional misconduct and ordered him to pay one-third of the taxed costs of the action and two-thirds of the costs of the application.

The misconduct alleged in the particulars supplied was :

"Discovery.

"In the light of the knowledge which the respective solicitors "had of the business conducted by their clients and of the "position and relationship of their clients and of the existence "of material documents which were or had been in the power, "possession or control of their several and respective clients, "each of the solicitors were guilty of misconduct in preparing "and advising or permitting their clients to make and file "affidavits of documents which were wholly inadequate and "obviously false." Upon this matter the learned judge's finding is expressed in the words: "In allowing the two earlier "affidavits to be sworn and put on the file I believe the solicitor "was allowing something to be done which he knew to be "wrong. In resisting further discovery, particularly in regard "to the Lloyds Bank account, he was obstructing the interests "of justice, he was adding to the difficulties of the plaintiff, and "he was causing delay in a case in which one must realise the "importance of the plantiff getting judgment speedily if she "was entitled to judgment."

It does not appear clearly from the finding of the learned judge whether he imputes blame to both the solicitor and to his clerk or whether the clerk only is censured and the solicitor punished for his servant's misdeeds. In these circumstances I think one must treat the solicitor as free from personal misconduct. This indeed was the view of a majority of the Court of Appeal before whom the wrongdoing of the clerk is assumed, but it was held nevertheless that no liability was imposed upon the solicitor in the absence of personal misconduct. Before your Lordships' House not only was this view supported by counsel for the respondent, but it was also strenuously maintained that in any case no misconduct had been proved even in the case of the clerk.

So far as the first point is concerned I agree with the opinion which all your Lordships have expressed. The Courts of this country have for long exercised disciplinary jurisdiction over their officers, whether described as attorneys or solicitors. Indeed it was not until the Solicitors Act, 1888, that a Committee of the Law Society was charged with investigating complaints against solicitors and reporting their decision to the Court, nor until the Solicitors Act, 1919, that the Law Society was given power to deal with the delinquencies of its own members. The Court, however, continued to exercise a concurrent jurisdiction, which was preserved by s. 5, sub-s. 1, of the Solicitors Act, 1932, and most lately asserted in *Brendon* v. *Spiro*. (1) That jurisdiction was exercised over the solicitor upon the record and was not confined to cases of personal misconduct only, e.g., in *Norton* v. *Cooper. In re Manby and Hawksford* (1), Hawksford, a member of a firm of solicitors, was held responsible to the Court though it was not suggested that he was guilty of personal misconduct or neglect of duty, and though his only knowledge of the case was that there was such a suit which his partner Manby was conducting. In that case the Court was exercising its summary jurisdiction over its officers, and the argument was expressly presented and rejected that such jurisdiction extended to relief only in cases of personal misconduct and neglect of duty.

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(1) [1938] 1 K. B. 176.

So too in *Simmons* v. *Rose* (2), a solicitor was ordered to make good the loss incurred by reason of his London agent having represented that a receiver had entered into the usual recognizances when in fact he had not done so.

In this case also the Court was asked to exercise and did exercise its summary jurisdiction over the country solicitor, though it was contended that it had no power to fix a solicitor with the consequences of professional misconduct except on the application of his client, and that the remedy in any case, if there were one, was against the London agent.

Whether one regards the liability of the solicitor as arising from a failure to exercise due supervision over his representatives or because he is responsible as the solicitor upon the record, the result is the same.

It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction. No doubt the penalty imposed will vary according to the circumstances of the case, and it may be that the more serious cases involving such personal misconduct as would result in the penalty of suspension or expulsion would now be left to the jurisdiction of the Law Society. But the Court still retains its summary jurisdiction and will exercise it in appropriate circumstances. The majority of the Court of Appeal took the view that unless personal misconduct was established the Court's only power under its summary jurisdiction to make the solicitor answerable

(1) 3 Sm. & G. 375. (2) 31 Beav. 1.

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for the costs of the other side was in cases where he had represented himself as having authority to act on behalf of a client when in fact he possessed no such authority, or in analogous cases. *Yonge* v. *Toynbee* (1) and *Simmons* v. *Liberal Opinion, Ld.* (2), are examples of the former, and *In re Eyre. Palmer* v. *Evans* (3), where the client had paid an excessive sum for costs owing to the misrepresentation of the solicitor's clerk, and *Dunkley* v. *Farris* (4), where the clerk had forged the seal of the Court to the writ, were said to be examples of the latter.

The occasion of the Court's action in cases of this kind no doubt is the wrongful receipt of money, or the breach of warranty of authority, but it is difficult to see how such acts would give the Court any authority to make an order against the solicitor in the original action except by virtue of its summary jurisdiction over his conduct. He is no party to the action nor is any claim being made against him by his own client. With all respect, I do not assent to the view of Greer L.J. (as he then was) that the solicitor can himself be treated as a party to the action because he has misrepresented himself as authorized to act for one party to the action and that he could therefore be made liable for the costs that have been incurred at the time when there was no defendant.

I think the principle is more accurately stated by Swinfen Eady J. (as he then was) in *Yonge* v. *Toynbee* (5): "Whatever "the legal liability may be, the Court, in exercising the "authority which it possesses over its own officers, ought to "proceed upon the footing that a solicitor assuming to act, in "an action, for one of the parties to the action warrants his "authority." In other words, the Court is not enforcing a civil right, but exercising its authority over the conduct of its officer.

Though in more recent cases the commonest occasion for imposing a liability upon a solicitor for the payment of the costs of the opposing side is in circumstances where he has assumed an authority which he did not possess, I cannot find that either principle or authority has confined the imposition of that obligation to such cases.

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(1) [1910] 1 K. B. 215.
(2) [1911] 1 K. B. 966.
(3) 1 C. B. (N. S.) 151.
(4) 11 C. B. 457.
(5) [1910] 1 K. B. 234.

But though the solicitor be liable for the action of his clerk, the question still has to be determined whether the clerk himself was guilty of any professional misconduct. Of course no question of misconduct relevant to the present case does or could arise in reference to the proceedings in the cases brought by Lady Chichele-Plowden or Mr. Still. Those proceedings are only material by way of a warning that discovery in the Myers action was of importance and should be carefully considered.

I say nothing of Nathaniel Rothfield's first affidavit, since it is possible, though unlikely, that in spite of the letter of February 24, 1936, he had never had anything to do with Horwood & Co., never had any dealing with Gold Alluvial shares, and therefore had neither documents nor bank accounts which were relevant, But before the second affidavit was sworn it had been ascertained that his denials of any connection were untrue and that a mass of documents and accounts existed which were relevant and had not been disclosed.

Indeed, apart from the discovery of the defectiveness of the first affidavit there was ample warning of the need of care.

Mr. Elman himself agreed that the decision whether the entries in a pass-book should be disclosed ought not to be left to a twenty-year-old client but should be determined by a solicitor or his managing clerk, and had said that after he received in April, 1937, the letters disclosed in Morser's statement of claim in the third-party proceedings he realized that something was wrong. Moreover, Osborn said that if he had realized that 54,000*l.* had passed through Nathaniel's banking account in sixteen months he would probably have thought it material.

It is plain that some sheets of the pass-book were examined with counsel, that the pass-book was in Osborn's hands for about a fortnight, that for months the opposing solicitors were pressing for further discovery, and yet until a further order was made in December nothing was done.

The learned judge's conclusion was that Osborn had

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examined the books and yet had failed to disclose the further relevant items.

I cannot say that this conclusion was unjustified merely because Osborn denied the examination. The book was in his possession, he had had warning of the materiality of full disclosure, and ample opportunity of examining it if he chose to avail himself of it. His excuse was that he meant to go through it later and that meanwhile Nathaniel took away the book in order to see if there were any further material items. Possession of the book, opportunity, and warning of materiality and of the need of care, combined with a duty to ascertain that the client fully understood the obligation imposed upon him, seem to me to be enough to warrant the judge's finding, arrived at after an opportunity of seeing the witness in the box.

In any case I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents by permitting the client to disclose part of a pass-book and to withhold the rest, using for that purpose the phrase "relevant entries only." Until it is known to him what those relevant entries are, disclosure is not complete. It is still the duty of the clerk in such circumstances himself to examine the book and see that the relevant items had been disclosed. That indeed was, as I have indicated, Mr. Elman's own view. The two earlier affidavits of Nathaniel Rothfield were wholly inadequate and the clerk in charge of the case must either have known the defectiveness of the second as the learned judge has found or been grossly negligent in failing to acquire that knowledge.

Either finding is, I think, enough to fix him and his employer with professional misconduct and to justify the order made in the Court of First Instance.

Appeal allowed.

Solicitors for appellant: *Peacock & Goddard, for Edge & Ellison, Birmingham.*

Solicitor for respondent: *Burnett L. Elman.*

[PRIVY COUNCIL.]

J. C.*
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Nov. 14.

COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES, LUCKNOW . . . APPELLANT;

AND

MESSRS. MOTIRAM NANDRAM . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT NAGPUR.

India—Revenue—Income-tax—Assessees appointed organizing agents—Deposit—Insolvency of principal company—Deposit not fully recovered—Loss of capital nature—Not a deductible expenditure for tax purposes—Indian Income-tax Act (XI. of 1922), *s.* 10, *sub-s.* 2 (*ix.*).

The assessees, who carried on businesses as cloth merchants and as moneylenders, by an agreement in writing in 1930 became the organizing agents for five years in a defined territory to a company of fuel oil and motor spirit importers and dealers, and deposited with that company Rs.50,000 which, under the agreement, was to " remain at the disposal of the company for the "purposes of the company's business and shall carry interest at "the rate of seven per cent. per annum until the deposit is "returned by the company to the organising agents out of the "selling agents' deposits." The selling agents were to be recommended by the assessees, but appointed by the company, and their deposits, which the company could use for the purposes of its business, were to be recovered on behalf of the company by the assessees, who were authorized to retain and appropriate them to the extent of Rs.50,000 towards the return of their own deposit with the company. The assessees were to be responsible to the company for the fulfilment of all obligations of all selling agents to the company, and were to pay commission to the selling agents out of the commission payable to them, the assessees, by the company. The company was also to provide the assessees with certain staff and office accommodation. The assessees duly deposited the Rs.50,000 in accordance with the terms of the agreement, but the company became insolvent before the assessees had recovered more than Rs.10,500 from the deposits made by the selling agents. The balance of Rs.39,500 was never in fact recovered from the company, and the assessees claimed to deduct that sum from the profits of their business or businesses—there being only one return :—

Held, that the character and object of the deposit must be determined with reference to the business of organizing agents in which the assessees engaged upon the terms of the agreement.

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* *Present:* LORD THANKERTON, SIR GEORGE RANKIN, and MR. M. R. JAYAKAR.

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The deposit was exacted by the company as a condition of the assessees being given an agency which they hoped to manage profitably. The purpose of being permitted to engage in such a business must be considered to be a purpose of securing an enduring benefit of a capital nature, and the deposit could not under the agreement and in the circumstances be regarded as an expenditure made in the course of carrying on an existing agency or any other business. The loss of the Rs.39,500 was therefore a loss of capital, and not a trading loss, and was not therefore a deductible item from the profits of the assessees' business or businesses under s. 10, sub-s. 2 (ix.), of the Indian Income-tax Act, 1922.

Judgment of the High Court reversed.

APPEAL (No. 32 of 1939) from a judgment and order of the High Court (November 6, 1936, and September 1, 1937, respectively) upon a reference made under s. 66, sub-s. 2, of the Indian Income-tax Act, 1922.

The respondents Messrs. Motiram Nandram, under the terms of an agreement dated December 17, 1930, by which they were to become the organizing agents to a company called the White Kerosene and Mineral Oil Company, which imported and dealt in fuel oils and motor spirit, deposited Rs.50,000 with that company. The respondents were authorized to recover their deposit from the deposits to be made by selling agents recommended by them. The company, however, became insolvent before the respondents had recovered more than Rs.10,500, and nothing more was ever in fact recovered from the company. The respondents claimed to be entitled to deduct the Rs.39,500 from their profits in the year of account, 1932–33, and the question referred to the High Court was: "Having regard to the terms of the agreement and the other circumstances of the case, was the "Assistant Commissioner justified in holding that the item "of Rs.39,500 was not a trading loss but a loss of capital?"

The facts, the terms of the agreement, and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The two judges of the Court of the Judicial Commissioner, to whom the reference was made, differed in their opinions; Subhedar A.J.C. being in favour of the respondents, Pollock A.J.C. being against them. On re-argument before the High Court at Nagpur (constituted pending the rehearing of the case) Gruer J. agreed with the view of Subhedar A.J.C., and the question referred was accordingly answered in the negative.

1939. Nov. 3. *J. M. Tucker K.C.* and *Hubert Hull* for the appellant. This is a case where English authorities would be in point. It is agreed that the Rs.39,500 was an irrecoverable debt—a loss. The sum of Rs.50,000 was not even paid away as an expense; it was merely a deposit, and the assessees were to get it back; admittedly there was the risk of it being lost. The loss was claimed by the respondents as a deduction, but it is not clear in respect of which particular business it was claimed; there is only one return, and they claimed it generally as a business loss. The position is really the same under the Imperial Act as under the Indian Act, namely, that there is no specified method of drawing up accounts, except that there must be a proper system of making up a revenue account; and in the Indian Act there is an express prohibition against deducting anything in the nature of capital expenditure, whereas there is not such a clear restriction in the English Act, but it is to be gathered from a number of House of Lords decisions.

It is submitted, first, that the Board are merely dealing here with what is said to be a question of law arising out of the order of the Assistant Commissioner, and that question of law is whether the Assistant Commissioner was right in holding that this was not a trading loss, but a loss of capital. In the course of stating the facts the Assistant Commissioner clearly says and holds that this was not a loan made in the course of the moneylending business of the respondents. If that is a question of fact, as, it is submitted, it is, then the only possible question of law which can arise on that is whether there is evidence to support it. The evidence in this case was the agreement itself. There is ample evidence on which the tribunal of fact could come to the conclusion that in making this deposit the assessees were not doing it as

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moneylenders for the purpose of earning profits as moneylenders, but for the purpose, as the agreement states, of being appointed the organizing agents in the oil business.

The assessees say that they can claim that this is a bad debt incurred in carrying on the agency business, and that therefore they are entitled to write it off against the profits of that business. The answer to that would be that not every bad debt incurred in carrying on business is a deductible expense. In *Rm. Ar. Ar. Rm. Arunachalam Chettiar* v. *Income-tax Commissioner* (1) this Board said that (2): "The "basis of the right to deduct irrecoverable loans before "arriving at the profits of money-lending is that to the money-"lender, as to the banker, money is his stock in trade or "circulating capital: he is dealing in money." In the present case what is being dealt with is an oil agency business, in which the business of an oil agent is not to lend money, and therefore if he lends money in the course of his oil agency business that is not an outlay of circulating capital, but of fixed capital. In all the English cases which in any way approach this matter, unless the person shows when he lends money in the course of carrying on his business that his business involves a lending of money, he cannot treat any bad debts as losses of his business for revenue purposes. The respondents might say that they made a loss on their agency business which they could set off, but even so, the bad debt was capital expenditure, because their agency business did not involve the lending of money. The principle in England is that for an assessee to be entitled to deduct any expenditure in arriving at his assessable profits it must be wholly and exclusively expended for the purpose of the business, and it must not be capital expenditure. That is the same position as in India. The present case stands on the same footing as *City of London Contract Corporation, Ld.* v. *Styles.* (3) If this were an out and out payment of Rs.50,000 it would still be a capital expenditure—a payment to get the contract—a fortiori if it is only a loan. [Reference was also made to

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(1) (1936) L. R. 63 I. A. 233.

(2) Ibid. 246.

(3) (1887) 2 Tax Cas. 239, 244.

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Stott v. *Hoddinott* (1); and *Vallambrosa Rubber Co., Ld.* v. *Inland Revenue.* (2)] *Henderson* (*H.M. Inspector of Taxes*) v. *Meade-King Robinson & Co., Ld.* (3) is not unlike the present case. It is also submitted that the principle underlying *Tata Hydro-Electric Agencies, Bombay* v. *Income-tax Commissioner, Bombay Presidency and Aden* (4) is applicable. On the facts stated the deposit was an investment of capital made solely in connection with, and for the purpose of, the new agency business of the respondents, and any loss thereof was a loss of capital, and therefore not deductible in computing the profit or loss of the respondents' business.

The respondents did not appear.

Nov. 14. The judgment of their Lordships was delivered by Sir George Rankin. In this case the respondents have not been represented before their Lordships.

The appeal is brought by the Commissioner of Income-tax, Central and United Provinces, Lucknow, from a decision of the High Court at Nagpur given upon a reference made to that Court under s. 66, sub-s. 2, of the Indian Income-tax Act, 1922. The question of law is as to the admissibility of a deduction of Rs.39,500 in computing the profits of the assessees' business. The year of assessment in respect of which the question arises is the year 1933–4, and as it is not contested that the sum in question was expended or lost in the "previous year," 1932–3, the deduction, if permissible, is claimed for the proper year.

By the terms of s. 10 of the Act the profits or gains of a business are to be computed after making certain allowances, one of which is provided for by the terms of cl. (ix.) of sub-s. 2 as follows: "(ix.) any expenditure (not being in the nature "of capital expenditure) incurred solely for the purpose of "earning such profits or gains."

The assessees are a Hindu undivided family, consisting of three brothers, who carry on business under the style of Motiram Nandram at Hinganghat, in the district of Wardha

(1) (1916) 7 Tax Cas. 85.
(2) 1910 S. C. 519, 526.
(3) (1938) 22 Tax Cas. 97, 104.
(4) (1937) L. R. 64 I. A. 215, 224.

in the Central Provinces, with a branch at Balaghat. Until 1930 their business or businesses consisted in dealing in cloth and in yarn and as moneylenders. But by an agreement in writing, dated December 17, 1930, they agreed to become organizing agents to a Bombay firm which, under the name of the White Kerosene and Mineral Oil Company, imported and dealt in kerosene motor spirit and fuel oils. The terms of this agreement are of importance for the decision of this appeal, but it will be sufficient to state their effect so far as is necessary to exhibit the course of dealing to which it looked forward.

The agreement refers to the Bombay firm as "the company," and to the assessees as "the organising agents." It recites that the assessees were carrying on business as cloth merchants; that they had requested the company to appoint them organizing agents in a defined territory known as Eastern Central Provinces; and that they had offered to deposit with the company Rs.50,000. The company by the agreement appointed the assessees to be organizing agents for five years in respect of the territory specified. Clause 4 recited that in consideration of such appointment the assessees had on December 8 and 12, 1930, deposited Rs.3000 and Rs.22,000—in all Rs.25,000. It provided that on or before January 17, 1931, they should deposit a further Rs.25,000. "The said sum of Rs.50,000 shall remain at the disposal of "the company for the purposes of the company's business, "and shall carry interest at the rate of 7 per cent. per annum "until the deposit is returned by the company to the "organising agents out of the selling agents' deposits as "hereinafter provided."

The assessees undertook the duty of finding suitable selling agents for the company's goods in the territory in question. These agents were to be recommended by the assessees, but were to be appointed by the company, and were to enter into agreements with the company under which they should make deposits with the company, which the latter could use for the purposes of its business. The deposits were to be received on behalf of the company by the assessees, who

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were authorized to retain and appropriate them to the extent of Rs.50,000 towards the return of their own deposit with the company. In respect of all contracts made by the company with the selling agents, the assessees guaranteed to the company the due payment of the price of such part of the indented goods as was not covered by the security deposits of the selling agents. If the assessees could not find selling agents who were willing to make deposits, they were to recommend persons for appointment by the company as selling agents on a salary to be paid by the company. But the assessees were to be responsible to the company for the fulfilment of all obligations to the company of all selling agents, and were to countersign all indents by selling agents for goods.

The assessees' commission was to be at the following rates: a guarantee commission of 1 per cent. on all goods sold in the territory through selling agents; a commission of four annas on every eight Imperial gallons of kerosene, and of two annas six pies on every gallon of motor spirit. Out of this commission the assessees were to pay commission to the selling agents.

The assessees were also to get a certain commission on fuel oil sold in the territory by the company; and were to be at liberty to canvass for orders for fuel oil, but not to effect sales, save through selling agents, without special permission of the company. Appropriate terms of commission were specified for such business. The commission account was to be made out every three months, and the assessees were to be paid their commission within a fortnight of the adjustment of the account. The company was to provide the assessees with certain staff and office accommodation, and to make certain allowances for the remuneration of a representative of the assessees at Hinganghat.

The assessees duly completed the deposit of Rs.50,000 as provided for by cl. 4 of the agreement, but the scheme was short-lived, as the company in 1931 became insolvent before the assessees had recovered more than Rs.10,500 from deposits made by selling agents. The sum of Rs.39,500 was outstanding and repayable by the company, but though the assessees on October 14, 1931, and November 23, 1931, recovered judgment for that sum, together with certain interest (amounting in all to Rs.42,272), in the High Court at Bombay, nothing was in fact realized in satisfaction thereof.

The assessees claim to deduct the sum of Rs.39,500 from the profits of their business or businesses in the year of account (1932-3), and this, if permitted, would convert their "total "income" finally assessed by the Assistant Commissioner at Rs.19,189 into a loss of over Rs.20,000. The income-tax officer refused to allow the deduction on the ground that the bad debt was a capital loss. The Assistant Commissioner took the same view, holding that "the deposit was neither a "loan nor an advance towards the cost of goods, nor did it "represent money laid out for business, but that it was "merely a security deposit, the object of which was to finance "the company and to secure and acquire a new business or "a new source of income." The Commissioner agreed in this opinion, and stated the facts of the case for the opinion of the Court, framing the question of law as follows: "Having "regard to the terms of the agreement (Exhibit A) and the "other circumstances of the case, was the Assistant Commis-"sioner justified in holding that the item of Rs.39,500 was not "a trading loss but a loss of capital?"

The reference was first heard by two learned judges of the Court of the Judicial Commissioner, Central Provinces, who gave judgment on September 30, 1935, Subhedar A.J.C. being in favour of the assessees, and Pollock A.J.C. being against them. On November 6, 1936, after the High Court of Judicature at Nagpur had been established, Gruer J. as third judge agreed with Subhedar A.J.C. The judgment appealed from is thus a judgment answering the question referred in the negative by a majority of two judges to one.

The view taken by Subhedar A.J.C. was that the deposit was made by the assessees in the course of their moneylending business, and Gruer J. also concluded "that the transaction "should be looked upon as a variation or extension of the "assessees' moneylending business." Pollock A.J.C., on the

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other hand, considered that " the deposit was money invested "in acquiring a new business, and that it was not a loan "made in the course of the assessees' moneylending business, "nor money laid out in the ordinary course of an existing "business."

Their Lordships are of opinion that the character of the expenditure which the assessees now seek to bring within cl. (ix.) of s. 10, sub-s. 2, must be determined with reference to the business of organizing agents in which the assessees engaged upon the terms of the agreement of December 17, 1930. This business was of a different nature from that of moneylender, and the principle that money is the stock in trade or circulating capital of a moneylender cannot of itself determine the question which arises in this case. Subhedar A.J.C. considered that " the assessees had nothing to do "with the oil business in which the company and the selling "agents were alone interested " and Gruer J. makes a similar observation : " Paragraph 13 provides that the organising "agents are not to effect any sales of the company's goods "themselves. Their duties were to organise the network of "selling agents to be guaranteed by them but appointed by "the company. Thus they were not actually carrying on "the company's business itself." But apart from the fact that the assessees under the agreement were to be at liberty to canvass for orders and, with special permission, to effect sales, the question is not whether the assessees were engaging in the business of merchants in oil. They were entering upon the business of organizing agents for a firm of importers—a business different in character from that of moneylender. They had undertaken to find suitable persons to be appointed as selling agents, and to guarantee the fulfilment of all obligations incurred towards the company by such selling agents, some of whom might be working on a salary basis without having given security. The nature of the deposit of Rs.50,000 must be considered in relation to this business.

Both of the learned judges who found in favour of the assessees appear to have considered that the course of business indicated in the agreement of December 17, 1930, bore analogy

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to the case of a proprietor of an estate borrowing money and appointing the lender to be manager of the estate. But this, in their Lordships' judgment, is to rewrite the agreement. The assessees might have recouped themselves out of deposits made by selling agents at any time, but though the interest at 7 per cent. would have ceased to be payable, the agency would still have gone on till the end of five years, and the assessees' work and commission, as well as their liabilities under their guarantee, might meanwhile have been heavy. It is impossible to regard the provision for a deposit as unconnected with the fact that the assessees were guaranteeing the selling agents' obligations. The deposits of the selling agents and of the organizing agents were alike deposits by way of security according to the scheme of the agreement, though its language—save for the use of the word " deposit "—is not express upon the point in the case of the organizing agents.

When the deposit is considered in relation to the organizing agency, the special terms of the agreement of December 17, 1930, are important, since various suggestions have been made as to the true character of the deposit. One suggestion is that the deposit should be looked upon as the purchase price of goods paid to the company in advance, and thus a mere trading expense ; but this cannot be accepted. It would be a highly inaccurate statement of the effect of the agreement. The Rs.50,000 was doubtless laid out with a view to earning profits in the business of organizing agents in addition to the interest of 7 per cent., but it was not so laid out with reference to any particular transaction carried out in the course of such business. It was in one aspect a loan made to the company, but it was not a loan made in the course of carrying on the business of organizing agents or in the course of the business of a moneylender. It was not a recurring expenditure. On the other hand, it was contemplated that in whole or in part the deposit should be returned to the assessees by the receipt of deposits from selling agents ; so that if the Rs.50,000 does fall to be regarded as invested in a business of organizing agents, it was invested with a prospect that it might be a temporary investment, and not a permanent one—in other words, that the capital might later be withdrawn from the business. The question in such a case as the present must be "what is the object of the expenditure ?" and it must be answered from the standpoint of the assessees at the time they made it—that is, when they were embarking upon the business of organizing agents for the company. The deposit was clearly exacted by the company as a condition of the assessees being given an agency which they hoped to manage profitably. Their Lordships think that the purpose of being permitted to engage in such a business must be considered to be a purpose of securing an enduring benefit of a capital nature, and that the deposit cannot, upon a true view of the terms of the agreement and the circumstances of the case, be regarded as an expenditure made in the course of carrying on an existing agency, or any other business. They think that the view taken by the income-tax authorities is correct, that this appeal should be allowed, and that the question referred to the Court by the letter of reference dated March 1, 1935, should be answered in the affirmative. They will humbly advise His Majesty accordingly. The assessees must pay the costs of the reference in the Judicial Commissioners' Court and High Court, and also the costs of this appeal.

Solicitor for appellant : *Solicitor, India Office.*

[HOUSE OF LORDS.]

H. L. (E.)* SKINNER . . . . APPELLANT;

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June 12, 13, 15; July 25.

AND

ATTORNEY-GENERAL . . . . RESPONDENT.

Revenue—Estate duty—Testator domiciled in Northern Ireland—Annuity bequeathed to wife and charged on residue—Testator's estate partly in Northern Ireland—Estate duty paid to Ministry of Finance in Northern Ireland—Part of proceeds of testator's estate invested in English investments—Widow's interest in English investments ceasing on her death—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 2, 5, 7, 22—*Finance Act,* 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14—*Finance Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *ss.* 24, 25—*Government of Ireland Act,* 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 28, 61—*Government of Ireland Act* (*Adaptation of the Taxing Acts*) *Order,* 1922.

A testator died on July 27, 1923, domiciled in Northern Ireland, having bequeathed an annuity to his wife during her life, charged on all his residuary estate, which consisted of real and personal estate in Northern Ireland, personal estate in England (which by reason of its small value was exempt from English estate duty), and real and personal estate in the United States of America.

The testator's executors paid estate duty to the Ministry of Finance in Northern Ireland on the entirety of the testator's personal estate and upon his real estate in Northern Ireland, such duty being leviable by the effect of the Government of Ireland Act, 1920, and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (St. R. & O., 1922, No. 8).

The widow died on February 5, 1936, domiciled in Northern Ireland, and at her death the testator's estate consisted of English investments, an investment in Northern Ireland, and real and personal estate in the United States of America. No part of the estate had been appropriated to meet the annuity, and the only outstanding liabilities were a claim for estate duty by the United States authorities, and legal expenses incurred in the United States in connection with the administration there:—

Held, (1.) that the interest of the widow in the testator's estate was not merely in the entirety of the estate considered as a unit to be administered, but in each part of it; (2.) that the widow had an interest ceasing on her death in the English investments within the meaning of s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894; (3.) that "estate duty" in s. 5, sub-s. 2, did not

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include estate duty in Northern Ireland under the Government of Ireland Act, 1920, and that the English investments were not exempt from English estate duty on the death of the widow, estate duty leviable in Northern Ireland and estate duty leviable in Great Britain being two separate and independent duties.

Per Lord Russell of Killowen. An annuitant whose annuity is payable out of a testator's estate is necessarily interested in all the parts which compose the whole, and the annuitant's right to take proceedings (if necessary) to have the estate administered for the purpose of providing the annuity is merely the right of enforcing or realizing that interest in the whole and its parts.

Lord Sudeley v. *Attorney-General* [1897] A. C. 11 considered.

Decision of the Court of Appeal [1939] Ch. 131 affirmed.

APPEAL from a decision of the Court of Appeal (1).

The testator, John Campbell White, died on July 27, 1923, domiciled in Northern Ireland. By his will dated December 2, 1920, he appointed his two nephews, the plaintiffs, Robert Skinner and Edward John Skinner, the plaintiff George Herbert Wheeler and William John McMillan (who died on May 1, 1933) to be his executors. He bequeathed to his wife, Edith Evelyn White, an annuity of 5000*l.* (increased by a codicil to 7500*l.*) free of income tax and surtax, and to his housekeeper an annuity of 100*l.* (increased by the codicil to 200*l.*) free of income tax; and after bequeathing certain pecuniary legacies he devised and bequeathed all his property, real and personal, not thereby otherwise disposed of, to his two nephews in equal shares, subject to and charged with the payment of his debts, funeral and testamentary expenses and all Crown duties and the legacies and annuities bequeathed. Neither the will nor the codicil declared any trusts, and there was no appointment of trustees.

The will and codicil were proved in Northern Ireland by the four executors on December 3, 1923, and the grant of probate was resealed in England on November 2, 1933.

The testator's estate at the date of his death consisted of real and personal estate in Northern Ireland, personal estate in the Irish Free State, personal estate in England (valued at 66*l.* 8*s.* 1*d.*) and real and personal estate in the United States of America. The executors paid estate duty to the Ministry

(1) [1939] Ch. 131.

of Finance in Northern Ireland on the entirety of the testator's personal estate and upon his real estate in Northern Ireland. No estate duty was paid in England owing to the smallness of the value of the English property. The testator's real and personal estate in the United States of America consisted of the residuary real and personal estate of his brother James Brice White, who at his death was domiciled in that country. By his will James Brice White appointed the testator and his two nephews to be trustees thereof and, after making a specific devise of certain real estate and bequeathing certain pecuniary legacies and annuities and directing that in certain events certain capital sums should be raised, he devised and bequeathed his residuary estate for the testator absolutely.

At the death of the testator the residuary real and personal estate of James Brice White had been ascertained and determined, but no provision had been made for any of the annuities or capital sums bequeathed by the will.

After the testator's death the two nephews as surviving trustees of James Brice White's will, being satisfied that the entirety of his residuary estate was not required for the purpose of providing for the annuities and capital sums, released portions of the residuary real estate from any liability to provide for them. The portions so released were sold from time to time during the lifetime of the testator's widow and the proceeds were handed over to the executors of the will of the testator. The remaining portions of the residuary real and personal estate of James Brice White were still held by the two nephews as the surviving trustees of his will in trust for the executors of the will of the testator, subject to provision being made thereout for the annuities and capital sums bequeathed by the will of James Brice White. These remaining portions were still locally situate in the United States. With the exception of these portions of James Brice White's estate, the whole of the testator's estate (including the portions of the residuary real and personal estate of James Brice White which had been released as above stated) was sold during the lifetime of the testator's widow. With the exception of certain liabilities in the United States to be presently mentioned, all the debts, funeral and testamentary expenses of the testator, and all duties payable on his death and all the legacies bequeathed by him had been paid and the balance (except a sum of 7000*l.* invested in Belfast Corporation Stock) amounting to 231,713*l.* had been, and at the widow's death still was, invested in English securities. Of that sum the sums of 46,597*l.* and 153,712*l.* respectively represented proceeds of sale of real and personal estate in the United States.

On the testator's death no claim was made by the United States authorities for estate duty upon his interest in the residuary real and personal estate of James Brice White, but in 1934 the testator's executors were called upon to pay such duty. At the death of the testator's widow this claim had not been settled and there were also certain legal expenses unpaid which had been incurred in the United States in connection with the administration in that country. The claim for duty was finally settled at $113,489.90, and this sum was paid on September 23, 1936. The legal expenses amounting to $10,506 had also been paid.

By a deed dated December 17, 1934, George Herbert Wheeler purported to retire from the trusts of the will and codicil of the testator. The deed contained a vesting declaration and provision for transferring to the two nephews certain investments mentioned in the schedule. But as there were no trusts declared and no trustees appointed by the will and codicil of the testator, this document was not effective for the purpose stated in it, and did not discharge George Herbert Wheeler from the office of executor.

The testator's widow died on February 6, 1936. The position with regard to the testator's estate was as follows: with the exception of the portions of the real and personal estate of James Brice White in the United States and charged with the annuities and capital sums bequeathed by his will and the 7000*l.* Belfast Corporation Stock, the entire estate consisted of English investments. The only outstanding liabilities of the testator's estate were the claim of the United States authorities for estate duty for which the testator's executors were personally liable, and the legal expenses already mentioned. Subject to these liabilities the estate was still retained by the executors for the purpose of securing the widow's annuity and the annuity of the testator's housekeeper, and the executors had not set aside any part of the estate to meet these annuities.

On May 1, 1936, the surviving executor took out an originating summons to determine whether, on the death of the widow, estate duty became payable in England on any of the English investments. The summons was heard by Clauson J., who held that estate duty became payable in respect of the English investments, such duty to be assessed in accordance with the provisions of s. 7, sub-s. 7, of the Finance Act, 1894, in respect of so much of the annuity as was properly apportionable to the said investments.

On appeal, the Court of Appeal affirmed the judgment of Clauson J., holding (1.) that the interest of the widow in the testator's estate was not merely in the entirety of the estate considered as a unit to be administered, but in each part of it; and (2.) that the widow had an interest ceasing on her death in the English investments within the meaning of s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894. Both Clauson J. and the Court of Appeal also held that "estate "duty" in s. 5, sub-s. 2, of that Act did not include estate duty leviable in Northern Ireland under the Government of Ireland Act, 1920, and that the English investments were not exempt from English estate duty on the death of the widow.

The executors appealed to this House.

J. M. Whitaker of the English Bar and K.C. of the Irish Bar, and *L. E. Curran* of the Northern Ireland Bar, for the appellants. As the only interest which the widow had was an interest in the residuary estate as a totality, namely a right to have it administered, and as that totality was a Northern Ireland residuary estate, it was not property in respect of which estate duty is payable in England. In any view, on the death of the widow her estate was entitled to the benefit of the exemption given by s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, which provides that in the case of settled property settlement estate duty shall be levied "except where the only life interest in the property after the "death of the deceased is that of a wife or husband of the "deceased." The only effect of the Government of Ireland Act, 1920, so far as this question is concerned, was to establish an Irish Exchequer, the Finance Act, 1894, continuing to apply both to England and Northern Ireland, subject to certain adaptations to meet the altered circumstances. Sect. 5 of the Finance Act, 1894, therefore remained operative in favour of the widow's estate. On behalf of the Crown it is said that payment of estate duty in Northern Ireland is not payment of estate within the meaning of s. 5 of the Finance Act, 1894. We submit that it was, and therefore that estate duty is not leviable in England on the widow's interest. [They also cited *Lord Sudeley* v. *Attorney-General* (1) ; *Attorney-General* v. *Watson* (2) ; and *Archer-Shee* v. *Garland*. (3)]

Sir Donald Somervell A.-G. and *J. H. Stamp* for the respondent. The widow had an interest in the property in question, the word " interest " being, as was said by Lord Russell of Killowen in *Tennant* v. *Lord Advocate* (4), " a word "capable of wide meaning " : see also *Attorney-General* v. *Watson*. (2) With regard to the liability to estate duty on that interest, the effect of the Government of Ireland Act, 1920, was to constitute for Northern Ireland a separate Government possessing law-making powers, among which was that of levying estate duty which is not the same duty as that leviable in England. Sect. 7, sub-s. 10, of the Finance Act, 1894, and s. 28 of the Government of Ireland Act, 1920, compel that construction.

J. M. Whitaker K.C. in reply. The legislation relied upon by the Attorney-General did not create any new estate duty, and consequently the exemption given by s. 2 of the Finance Act, 1894, still obtains and is operative in favour of the appellants.

(1) [1897] A. C. 11.
(2) [1917] 2 K. B. 427.
(3) [1931] A. C. 212.
(4) [1939] A. C. 207, 213.

The House took time for consideration.

1939. July 25. LORD ATKIN. My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen. I entirely agree with it, and I have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, two questions were argued in this case. The first was whether estate duty was chargeable at all in England upon that part of the estate of John Campbell White (to whom I will refer as the testator), which at the death of his widow consisted of what were termed English securities ? The second question was whether if estate duty was so chargeable, any relief could be claimed under s. 5 of the Finance Act, 1894 ?

The testator died, domiciled in Northern Ireland, on July 27, 1923. By his will, dated December 6, 1918, he appointed the appellants, and one McMillan now deceased, to be executors thereof. He bequeathed sundry specific and pecuniary legacies including an annuity of 5000*l.* for her life to his wife and (by clause 5) devised and bequeathed his property in the following terms : " I devise and bequeath all "my property both real and personal and wheresoever situate "not hereby otherwise disposed of unto my two nephews "Edward John Skinner and Robert Skinner in equal shares "subject to and charged with the payment of my debts "funeral and testamentary expenses and all Crown duties "and the legacies and annuities which are bequeathed by "this my will." By a codicil dated December 2, 1920, he increased the amount of his wife's annuity to 7500*l.* Probate of the will and codicil was granted to the four executors in Northern Ireland and was subsequently resealed in England.

The testator's estate at his death consisted of real and personal estate in Northern Ireland, personal estate in the Irish Free State, and real and personal estate in the United States of America. There was also a small amount of personal estate in England, but of such little value that no estate duty was payable here in respect thereof. From time to time during the lifetime of the testator's wife, portions of the real and personal estate in the United States were sold, and the proceeds were invested by the executors. Except as hereinafter stated, all funeral and testamentary expenses, duties, debts and legacies were paid, and the balance (except a sum of 7000*l.* Belfast Corporation Stock) amounting to 231,713*l.* was during the lifetime of the testator's wife invested in English securities, and still remained so invested at her death, which occurred on February 6, 1936. The estate had not, however, even then been fully administered. A claim for estate duty by the revenue authorities in the United States was still outstanding, which was not finally settled and paid until September 23, 1936. The legal costs incurred in connection therewith were subsequently paid. Some real and personal estate in the United States has not yet been got in but is still outstanding.

In these circumstances a claim has been made by the authorities here that estate duty became payable on the widow's death under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, in respect of the testator's estate in so far as it was then represented by English securities, upon the ground that it was property in which the widow had an interest ceasing on her death, and was therefore property which must be deemed included in property passing on her death. That an annuitant, such as the widow in this case, has an interest in the residuary estate within the meaning of the section was the subject of decision many years ago in *Attorney-General* v. *Watson* (1): and the interest is certainly not diminished where, as here, the entirety of the estate out of which the annuity is payable is expressed to be charged with the annuity.

The appellants, however, contended that the widow had no interest in individual items forming part of the general estate, but that the only interest which she had, was an interest in the residuary estate as a totality, namely a right to have that totality administered, and that since that totality was what was termed, " a Northern Ireland residuary estate,"

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(1) [1917] 2 K. B. 427.

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it was not property in respect of which estate duty was payable in this country.

My Lords, I have throughout experienced great difficulty in appreciating this argument, which depended, it was said, for its efficacy upon the decision of this House in *Lord Sudeley* v. *Attorney-General.* (1) It appears to me to be beyond question that an annuitant, whose annuity is payable out of a testator's estate and who is therefore interested in the whole estate, is necessarily also interested in all the parts which compose the whole; and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity, is merely the right of enforcing or realizing that interest which she has in the whole and its parts. Nor can I find any foundation for the appellants' contention in *Lord Sudeley* v. *Attorney-General.* (1) That case was concerned with probate duty. The executors of the testator's widow sought to escape probate duty (in respect of her one-fourth share of the residuary estate of the testator) to the extent of a one-fourth share of certain mortgages of real estate in New Zealand upon which a portion of the testator's residuary estate was invested. They sought to establish that the widow had a proprietary interest in, and was the owner of, a share of the mortgages, i.e., of property situate in New Zealand in respect of which no probate duty would be payable here. They failed because the mortgages did not, nor did any share in them, constitute an asset of the widow's estate. The testator's estate had not been administered, nor had any appropriation to the widow's share been made. The whole point of the decision was that the widow did not own any part of the mortgages. As Lord Herschell pointed out in his speech (2) the whole fallacy of the argument of the widow's executors rested on the assumption that she or they were entitled to any part of the mortgages as an asset—she in her own right or they as executors. "I do not think," he said, "that they have any "estate, right, or interest, legal or equitable, in these New "Zealand mortgages, *so as to make them an asset of her* "*estate.*" My Lords, I emphasize the last ten words of that

(1) [1897] A. C. 11. (2) Ibid. 18.

sentence, which show clearly that the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator " has an interest " in the different items of which that estate from time to time consists.

I feel no doubt that the appellants fail upon the first question.

The second question depends, I think, for its answer on an appreciation of the state of affairs which has resulted in regard to estate duty, from the operation of the relevant sections of the Government of Ireland Act, 1920, and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922. The Act I will refer to as the Act of 1920. The Order I will refer to as the Order in Council.

By the Act of 1920 a separate Parliament and a separate executive government were set up in Northern Ireland, and by s. 20 an Exchequer and Consolidated Fund of Northern Ireland were established separate from those of the United Kingdom, all sums paid into that Exchequer forming the Consolidated Fund of Northern Ireland to be appropriated by Act of the Parliament of Northern Ireland to the public service of Northern Ireland. By s. 21 the proceeds of all taxes which the Parliament of Northern Ireland has power to impose (and these include death duties) must be paid into that Consolidated Fund. Sect. 28 (to which I refer later) contains provisions in relief of death duties payable both in Northern Ireland and Great Britain on the same property. Sects. 61 and 69 must be (so far as relevant) cited verbatim. They are in the following terms: " 61. All existing laws, "institutions, and authorities in Ireland, whether judicial, "administrative, or ministerial, and all existing taxes in "Ireland, shall, except as otherwise provided by this Act, "continue as if this Act had not passed, but with the modifications necessary for adapting them to this Act, and "subject, as respects matters within the powers of the Parlia-"ments of Southern Ireland and Northern Ireland, and after

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"the date of Irish Union within the powers of the Parliament "of Ireland, to repeal, abolition, alteration, and adaptation "in the manner and to the extent authorised by this Act.

"69. His Majesty may, by Orders in Council (in this Act "referred to as Irish Transfer Orders), make such regulations "as seem necessary or proper for setting in motion the Parliaments and Governments of Southern and Northern Ireland, "and when established the Parliament and Government of "Ireland, and also for any other matter for which it seems "to His Majesty necessary or proper to make provision for "the purpose of bringing this Act into full operation or for "giving full effect to any provisions of this Act or to any "future transfer under or by virtue of this Act of a reserved "service; and in particular His Majesty may by any such "Order in Council—(*a*) make such adaptations of any enactments so far as they relate to Ireland as may appear to "him necessary or proper in order to give effect to the provisions of this Act, and also make any adaptations of any "enactments so far as they relate to England or Scotland, as "may appear to him necessary or proper as a consequence of "any change effected by the provisions of this Act . . . ."

. . . .

The Order in Council was made on January 31, 1922. It recites (inter alia) s. 69 (*a*) of the Act of 1920, and that for the purposes of the provisions of that Act relating to the transfer of services, November 22, 1921, has been fixed as the appointed day as respects Northern Ireland in relation to the financial provisions of the said Act, including taxation. It contains (amongst other provisions) the following: (s. 2) that as from November 22, 1921, the enactments to which the several parts of the Order apply shall have effect subject to the adaptations and modifications set out in those parts respectively, save where inconsistent with the Act of 1920, or the provisions of any subsequent Order in Council under that Act, and subject as respects matters within the powers of the Parliament of Northern Ireland to repeal or alteration by Acts of that Parliament. Part III. of the Order consists of ss. 12, 13 and 14, of which s. 13 is a transitory provision, and may be disregarded. Sects. 12 and 14 so far as relevant run thus: "12. This Part of this Order applies "to the Death Duties Acts, that is to say, the Probate and "Legacy Duties (Ireland) Act, 1814, (*a*) the Probate Duty "(Ireland) Act, 1816, (*b*) the Succession Duty Act, 1853, "(*c*) Part III. of the Customs and Inland Revenue Act, 1881, "(*d*) Part II. of the Customs and Inland Revenue Act, 1889, "(*e*) and Part I. of the Finance Act, 1894, (*f*) and the enactments amending those Acts or otherwise relating to death "duties as defined in section thirteen of the Finance Act, 1894. "14. As respects death duties leviable in Northern Ireland "and in the rest of the United Kingdom respectively on or "with reference to deaths occurring on or after the appointed "day, the Death Duties Acts shall apply subject to the "following adaptations: (*a*) In those Acts, in their application "to Northern Ireland—(I.) references to the chief office of the "Commissioners of Inland Revenue in London shall be "construed as references to the chief office of the Minister of "Finance for Northern Ireland for purposes of inland revenue; "(*b*) References to the United Kingdom in section four of "the Revenue (No. 2) Act, 1864, (*a*) in section twenty-eight "and sub-section (I.) of section thirty-three of the Customs "and Inland Revenue Act, 1881, in sub-section (2.) of section "two, sub-sections (2.) and (3.) of section seven and sub-"section (3.) of section twenty of the Finance Act, 1894, and "section eight of the Savings Bank Act, 1920, (*b*) shall, in "the application of those provisions to Northern Ireland, be "construed as references to Northern Ireland, and, in the "application of those provisions to the rest of the United "Kingdom, shall be construed as references to the United "Kingdom exclusive of Northern Ireland: . . . . "(*d*) Sub-section (2.) of section 7 of the Finance Act, 1894, "shall have effect as if for the words 'in the foreign country "'or British possession' there were substituted the words "'in the country'"; . . . .

My Lords, it will thus be seen that estate duty became leviable both in Northern Ireland and in the rest of the United Kingdom (which I will call Great Britain) by two independent executives, the proceeds being applicable for two different public services. But the further question remains whether the two executives levy one and the same tax in which each is or may be entitled to share, or whether each executive levies a separate tax, the power to levy which is vested in the executive of Northern Ireland under or by virtue of one law in force in and applying to Northern Ireland and in the executive of Great Britain under or by virtue of another law applying to and in force in Great Britain.

The importance of the difference becomes apparent when I explain how the appellants' claim to exemption arises, which I now proceed to do.

By s. 5, sub-s. 2, of the Finance Act, 1894, it is provided that if estate duty has already been paid in respect of any settled property since the date of the settlement, estate duty shall not be payable in respect thereof until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property. The relief afforded by this section was abolished by s. 14 of the Finance Act, 1914, but not (in the case where estate duty has been paid on the death of one of the parties to a marriage) so far as regards the payment of estate duty on the death of the other party to the marriage. If, therefore, the estate duty which is leviable and payable in Northern Ireland is one and the same as the estate duty which is leviable and payable in Great Britain, the exemption would apply in the present case as regards the English securities, except in so far as they represented proceeds of sale of real estate in the United States, in respect of which no estate duty had been levied or paid in Northern Ireland on the testator's death. If, however, estate duty leviable in Northern Ireland and estate duty leviable in Great Britain are two separate taxes leviable under separate statutory provisions as before indicated, the exemption would not apply, because the estate duty paid in Northern Ireland on the death of the testator under the law in force in Northern Ireland would not be estate duty within the meaning of the

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Finance Act, 1894, as adapted and applicable to Great Britain after the coming into operation of the Act of 1920.

For myself I feel no doubt that the true view as regards estate duty is that whereas before the Act of 1920 and the Order in Council the six counties and Great Britain were parts of one country, which had power to levy one tax for the purpose of raising revenue for one set of public services, the effect of the Act of 1920 and the Order in Council was to split that country into two countries (namely, Northern Ireland and Great Britain) each with power to levy its own tax for the purpose of raising revenue for its own public services. In my opinion the effect of ss. 12 and 14 of the Order in Council as regards the Finance Act, 1894, is that with reference to deaths occurring on or after the appointed day estate duty becomes leviable in Northern Ireland under one set of statutory provisions, namely the Finance Act, 1894, as adapted and applicable to Northern Ireland, and in Great Britain under another set of statutory provisions, namely the Finance Act, 1894, as adapted and applicable to Great Britain. The different statutory provisions are made applicable severally to the two countries.

It was urged before us that because the Order in Council did not in terms refer to or in any way purport to adapt or modify s. 5 of the Finance Act, 1894, the right to relief thereunder must remain unaffected. In my opinion no express reference to or adaptation or modification of s. 5 was necessary. All that was necessary was the modification of the specified sub-sections by altering the construction thereof as provided in the Order in Council. Everything else follows as of course. A separate estate duty became leviable by each country for its own purposes, the amount thereof in each case being arrived at after a different and separate aggregation of properties, and being ascertained in each case by reference to the principal value of a different and separate estate, the value being determined in each case by the valuation of a separate and independent authority.

Any other view leads to insoluble difficulties, of which two examples may be sufficient. Sect. 28 of the Act of 1920 is

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in the following terms: "28.—(1.) Where the Commissioners "of Inland Revenue are satisfied that estate duty or any "duty in the nature of estate duty is payable in Southern "Ireland or Northern Ireland by reason of a death in respect "of any property situated in Southern Ireland or Northern "Ireland and passing on such death, they shall allow a sum "equal to the amount of that duty to be deducted from the "estate duty payable in Great Britain in respect of that "property on the same death.

"(2.) Where the Department of the Government of Southern "Ireland or Northern Ireland corresponding to the Commissioners of Inland Revenue are satisfied that estate duty is "payable in Great Britain by reason of a death in respect "of any property situate in Great Britain and passing on such "death, they shall allow a sum equal to the amount of that "duty to be deducted from the estate duty or duty in the "nature of estate duty payable in Southern Ireland or "Northern Ireland in respect of that property on the same "death."

That section shows that estate duty is payable both in Great Britain and in Northern Ireland on the same property on the same death. It plainly contemplates two separate and possibly overlapping duties. I do not see how that can be reconciled with s. 1, sub-s. 10, of the Finance Act, 1894, except upon the footing that the estate duty leviable in Northern Ireland and the estate duty leviable in Great Britain are two separate independent duties.

Again, take s. 4 of the last mentioned Act. If there is only one estate duty leviable in the two countries, and not two separate duties leviable as to one in Northern Ireland and as to the other in Great Britain, the property in both countries would have to be aggregated under that section in order to arrive at the rate payable in each.

In these circumstances it is not in my opinion possible to hold that the estate duty which was paid in Northern Ireland on the death of the testator was estate duty within the meaning of s. 5, sub-s. 2, of the Finance Act, 1894, as adapted and applicable to Great Britain after November 22,

1921. No relief can, therefore, be claimed by the appellants under that section, and the appeal should be dismissed.

My Lords, my noble and learned friend Lord Porter has asked me to say that he agrees with the opinion which I have read.

LORD MACMILLAN. My Lords, I concur.

LORD WRIGHT. My Lords, I also concur.

Appeal dismissed.

Solicitors for appellants: *Russell & Arnholz.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)*

1939

Nov. 29, 30; Dec. 4, 5, 6.

1940

Feb. 6.

LADY NAAS AND ANOTHER . . . . . . APPELLANTS;

AND

WESTMINSTER BANK, LIMITED . . . RESPONDENTS.

Settlement—Execution by settlor—Non-execution by beneficiary—Settled fund in hands of bank as trustees—Fund returned to settlor—Liability of bank to beneficiary.

S. in 1923 executed a deed of covenant by which he covenanted to pay to the first appellant such a weekly sum as, after payment of income tax thereon, would leave the clear sum of 10*l*. a week. This sum was to be paid to her during her lifetime or "until "the execution by the settlor of a settlement in accordance with "his option in that behalf," therein contained, which provided that in case the settlor should by will or settlement secure to the beneficiary an annuity of equal or greater amount than the said weekly sum, the annuity so bequeathed or secured should be in satisfaction of the weekly sum which should in that case cease to be payable. Later in 1923 the settlor being desirous of making a settlement in favour of the first appellant and the infant appellant, procured to be inscribed in the name of the respondent bank a sum of 15,000*l*. India 4½ per cent. stock to be held meanwhile to the settlor's orders. A settlement was then prepared and was signed, sealed and unconditionally delivered by the settlor. It was expressed to be made by the settlor of the first part, the first appellant (therein called "the first beneficiary") of the second part, and the respondent bank of the third part. It recited the deed of covenant, stated that the settlor was desirous of making provision for the appellants and had for that purpose transferred the India stock into the name of the bank to be held and applied by it upon the trusts therein declared, and in consideration of that settlement the settlor was to be released from the covenants in the above-mentioned deed of covenant. The settlement so executed by the settlor was sent to the first appellant for execution by her, but delays took place and although she was ready and willing to execute it she never in fact did so. There was, however, never any disclaimer by her of her interest under the settlement. The settlor's solicitors taking the view that as the first appellant had not executed the settlement, the trust fund should be returned to the settlor, and eventually the respondents did so upon an indemnity given by the settlor:—

Held, that when once the settlor had signed, sealed and unconditionally delivered the deed the trusts in favour of the appellants were constituted; that the respondents had notice of the deed and of the beneficial interests thereby vested in the appellants, and had become trustees of the stock for their benefit, and were therefore liable to the appellants.

**Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

The statement by Sir George Jessel M.R. in *Luke* v. *South Kensington Hotel Co.* (1879) 11 Ch. D. 121, 125, that "it is well "settled that if two persons execute a deed on the faith that a "third will do so, and that is known to the other parties to the "deed, the deed does not bind in equity if the third refuses to "execute," is expressed far too widely.

Disclaimer of a deed is a solemn irrevocable act, and, where it is alleged, the Court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention.

Decision of Court of Appeal reversed.

Appeal from a decision of the Court of Appeal reversing a decision of Morton J.

In 1923, one Edward Anthony Strauss (hereinafter called the settlor) executed a deed of covenant with the first appellant (formerly Miss Wilson) under which he covenanted to pay to her such a weekly sum as after payment of income tax thereon would leave a clear sum of 10*l.* a week during her life or "until the "execution by the settlor of a settlement in accordance with his "option in that behalf" thereinafter contained. Clause 4 was in these terms: "4. Provided always that in case the settlor "shall by will bequeath or by settlement secure to the "beneficiary during her life an annuity of equal or greater "amount than the weekly sum hereby made payable as "aforesaid then the annuity so bequeathed or secured shall "be in satisfaction of such weekly sum which shall in that "case cease to be payable from such date."

Shortly afterwards the settlor lodged with the respondent bank, to be inscribed in their name 15,000*l.* 4½ per cent. India 1950–55 scrip for the purposes of the proposed settlement. The draft of the settlement of which they were to be trustees was also sent to the respondents for their approval and they approved it, and from a date a little later they by order of the settlor paid to the first appellant 130*l.* per quarter out of the dividends of the stock. In August, 1925, the settlement was executed and unconditionally delivered by the settlor as his act and deed. The settlement secured to the appellants sums greater than those payable under the deed of covenant and purported to be in substitution for its provisions. It also contained trusts in favour of the infant appellant. Thereafter the settlement was sent to the first appellant for execution. She was then abroad and on her return she and the settlor agreed that the deed of covenant should be destroyed, but the settlor's solicitors objected, and the first appellant thought that she was to keep the settlement. She then went off on a long tour and forgot about the execution of the settlement, her attention not being again directed to it until February, 1927, when, finding that she had not executed it, she proposed to sign and complete it. Meanwhile, as she alleged, the respondents, behind her back, were negotiating with the settlor for returning to him the trust fund. The settlor's solicitors requested the respondents to retransfer the trust fund, and eventually they did so upon an indemnity given by the settlor.

In an action against the first appellant by the respondent Bank, the appellants counterclaimed—(*a*) a declaration that the respondents were trustees of the above mentioned stock and proceeds of the sale thereof upon the trusts declared concerning the same by the settlor; (*b*) a declaration that in paying over the proceeds of the sale to the settlor they acted wrongfully and in breach of trust; (*c*) an order upon the respondents to replace the stock or the present value thereof; (*d*) damages for breach of trust.

At the trial it was admitted on behalf of the respondents that the deed of settlement was unconditionally executed and delivered; that prior to parting with the trust funds the respondents had notice of the deed and its contents; and that the respondents would draw no distinction between the claims of the two appellants.

Morton J. in the course of his judgment said that it had been argued on behalf of the respondents that it was the settlor's intention that he should not be bound by the deed unless and until all parties had executed it, but he was not satisfied on the evidence, nor was he prepared to infer, that the settlor had the intention referred to, or that the other parties to the deed knew of that intention. Moreover, even if the evidence established that, the decisions cited on behalf of the respondents, namely, *Luke* v. *South Kensington Hotel Co.* (1), *Peto* v. *Peto* (2), and *In re Morton* (3), were distinguishable, for in none of these cases could the deed take effect according to its tenor unless it was executed by all parties, while in the case before him the settlement could, and in his opinion did, take effect as a declaration of trust by the settlor notwithstanding that he alone had executed it. Further, the rights of the infant and the duty of the respondents to keep the settled fund in their hands could not, in his view, be affected in the slightest degree by the conduct of the first appellant.

The Bank appealed to the Court of Appeal and there it was held that at the relevant date the settlor was entitled to treat the settlement as no longer effective as against the Bank in that it was executed by the settlor on the faith that the first appellant would execute it—a circumstance which brought into operation the equitable principle that if two persons execute a deed on the faith that a third will also do so, and that is known to the other party to the deed, the deed does not bind in equity if the third party refuses to execute. That principle applied equally to a case such as this where a deed confers a benefit on a third person not a party to it, and it appears upon the face of the deed that it was executed by the person providing the benefit upon the faith that the other party would execute it.

The beneficiaries appealed to this House.

A. M. Sullivan, Serjeant and *K.C.*, *J. M. Gover K.C.*, *F. E. Skone James* and *A. D. Houston* for the appellant. It being admitted that the settlement was given not as an escrow but was unconditionally delivered by the settlor, it follows that notwithstanding the fact that it was not executed by the appellant, it took effect: *Morgan* v. *Pike* (4) where it was held that a covenantee in an ordinary indenture, who is a

(1) (1879) 11 Ch. D. 121, 125.
(2) (1849) 16 Sim. 590.
(3) [1932] 1 Ch. 505.
(4) (1854) 14 C. B. 473.

party to it, may sue the covenantor who executed it, although he himself has not executed it: see also *Bowker* v. *Burdekin* (1), where there was a deed of assignment, purporting to be made by all three partners of a firm, and to convey all their personal estate and effects in trust for the benefit of creditors, but was executed by one only of the parties, it was held that it operated to convey the share of the one who executed it. To the same effect is the statement of law in Sheppard's Touchstone, vol. i., p. 71. No doubt the position is different where a person executes a deed on the distinct understanding that another person will also execute it: see *Evans* v. *Bremridge* (2) and *Cooper* v. *Evans*. (3) In the present case the Court of Appeal, founding on a statement of Sir George Jessel M.R. in *Luke* v. *South Kensington Hotel Co.* (4) to the effect that "it is well settled that if two persons execute a deed on the "faith that a third will do so, and that is known to the other "parties to the deed, the deed does not bind in equity if "the third refuses to execute, and consequently on that "ground the deed could not have bound the two." The proposition so stated, we submit, is not accurate; and there is no support for it in the books. The appellant is claiming a benefit on the footing that she has, all along, been ready and willing to be bound by the deed.

Sir William Jowitt K.C., *H. Wynn Parry K.C.* and *Valentine Holmes* for the respondent. It is plain that what was contemplated was a bilateral deed; and as is accurately stated in Norton on Deeds, 2nd ed., p. 21: "Equity will of course "relieve against a deed delivered on the faith of others "executing it, even if the delivery be complete, and not upon "condition if the others fail to execute it." In *Bolitho* v. *Hillyar* (5), Sir John Romilly M.R., following *Peto* v. *Peto* (6) held that "when persons enter into a mutual contract, the "consideration for which is, that all the parties shall be "bound by it, then, if one cannot be or is not bound, the "contract is not binding on the rest;" see also *Underhill* v.

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(1) (1843) 11 M. & W. 128.
(2) (1856) 8 De G. M. & G. 100.
(3) (1867) L. R. 4 Eq. 45.
(4) 11 Ch. D. 121, 125.
(5) (1865) 34 Beav. 180, 183.
(6) 16 Sim. 590.

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Horwood (1); and *Carew's* case (No. 2) (2), where Turner L.J., referring to a covenant of indemnity, said that "the covenant "of indemnity was intended to be entered into by all parties, "and it was entered into by the subscribers on the faith of "its being entered into by the managing directors also. But "as no managing director executed it, the parties who "intended to be bound jointly with others were left bound "alone, and I consider that in such a case they have a right in "equity to insist that they are not bound at all." The statement by Sir George Jessel M.R. in *Luke* v. *South Kensington Hotel Co.* (3) is of wide application and should be followed in this case. The appellant cannot keep a document for an indefinite time, refuse or fail to execute it, yet nevertheless hold the respondent to it. The return by the appellant of the document to the settlor without her signature effected a renunciation of any right she would have had under it. Short of a finding of fact that the appellant was prevented from signing, the settlor, who had signed it on the faith that the appellant also would sign it, was entitled to rely on the fact that it was returned unsigned.

Serjeant Sullivan replied.

The House took time for consideration.

On a subsequent day their Lordships announced their decision in favour of allowing the appeal, and said that they would state their reasons later.

1940. Feb. 6. VISCOUNT MAUGHAM. My Lords, I have had the advantage of reading the reasons of my noble and learned friend Lord Russell of Killowen on this appeal, and I find myself in agreement with them. No useful purpose therefore would be served by a restatement of the somewhat complicated facts and documents; and if it were not for the circumstance that, like my noble friend, I have felt compelled to differ from the judgments of the Court of Appeal I would add nothing of my own. The appeal, however, raised points of considerable importance; and out of respect for the Court of Appeal I will state in my own language the grounds on which, as I viewed the case, the appeal was allowed and the judgment of Morton J. restored.

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(1) (1804) 10 Ves. 209, 225.
(2) (1855) 7 De G. M. & G. 43, 52.
(3) 11 Ch. D. 121, 125.

The first point to be considered is the effect on the deed of covenant dated February 1, 1923, of the settlement executed in August, 1925, by the covenantor (a gentleman whom I propose to call "the settlor"). Is the settlement one which is in pursuance of and in accordance with the option given to the settlor by clause 4 of the deed of covenant, or, alternatively, is the declaration contained in clause 17 of the settlement a declaration which under clause 5 of the deed of covenant is final, binding and conclusive on all parties? In either event the covenant for payment in clause 1 of the deed of covenant comes to an end under the express terms of clause 1 of that deed. In answering this question it is to be noted that the settlement was plainly intended to be such a settlement as was contemplated by the deed of covenant since the settlement contains a recital of that deed including clause 5 thereof. It is true that the settlement gives to Miss Wilson a life interest which comes to an end if she does or attempts to do any act or thing or any event happens whereby if the same were payable to her absolutely for her life she would be deprived of the right to receive the same or any part thereof; but the deed of covenant contained a substantially similar limit to the covenant for payment in clause 1. Assuming this would not be an annuity "during the life" of Miss Wilson as contemplated by clause 4 of the deed of covenant read alone, we have to bear in mind the provision in clause 5 which gives the settlor a free discretion to insert in the settlement under the option "any "trusts not repugnant to the preceding text," coupled with a provision that "any declaration by him that the same is in "satisfaction of the provisions hereinbefore contained shall "be final, binding and conclusive." I have formed a clear opinion that these two clauses are sufficient to justify the insertion of the protected life interest in the settlement, and that the deed of covenant came to an end to all intents when the settlor executed the settlement in August, 1925.

It may be said that this construction of the deed of covenant is one as to which there can be a legitimate difference of opinion, as is indeed evident from the judgments of the Court of Appeal. This leads me to my second point as regards which I cannot see any room for legitimate doubt; and that is that Miss Wilson could not knowingly accept any benefit under the settlement without releasing all her rights, if any, under the deed of covenant. The settlement proceeds on the footing that those rights are extinguished. It is clear beyond doubt that a party who knowingly takes the benefit of a deed is bound by it although he has not executed it. Her own solicitor had approved the form of the settlement so that there is no question of surprise or duress or misunderstanding. The principle I have stated is to be found in the Year Books, but it is not necessary to go back earlier than Coke upon Littleton (230 b and n (1)). There are a number of later authorities: see *Morgan* v. *Pike* (1); *MacDonald* v. *Law Union Fire and Life Insurance Co.* (2); *May* v. *Belleville.* (3) It follows that it was immaterial whether or not Miss Wilson executed the settlement if she accepted her allowance from the respondents (whom I will call "the bank") as trustees of the settlement. She did in fact accept that allowance from the bank from the time when the settlement was executed until November, 1926. In my opinion she was bound by the settlement long before the settlor purported to revoke it on the alleged ground that the lady had not executed it.

But then it is asserted, and this I think is the third point, that it was more satisfactory to the settlor to have an express release by Miss Wilson as provided by clause 16 of the settlement, that the instrument provided for such a release, and that the deed was executed by the settlor "upon the faith" that Miss Wilson would execute it. It is true, as pointed out by the Master of the Rolls, that it was open to the settlor to stipulate for a release, and that by the form of the deed a release was to be given. On the other hand it is admitted, and, I doubt not, rightly admitted, that the settlement was not executed

(1) 14 C. B. 473.
(2) (1874) L. R. 9 Q. B. 328, 330.
(3) [1905] 2 Ch. 605, 612.

as an escrow. Nor is it argued that upon the true construction of the settlement there was an implied condition in law that Miss Wilson should execute the settlement. Nor is it suggested that the settlor when he delivered the document as a deed made any statement to anyone, or that he expressed an intention that it was not to take effect until Miss Wilson had executed it. What is contended is that he can escape liability under the settlement on an equitable principle which was formulated by Jessel M.R. in the following terms: "It is "well settled that if two persons execute a deed on the faith "that a third will do so, and that is known to the other parties "to the deed, the deed does not bind in equity if the third "refuses to execute:" *Luke* v. *South Kensington Hotel Co.* (1) This dictum, for it was no more having regard to the facts of the case, now requires consideration.

Sir George Jessel was purporting to state the existing law which he says was well settled. Your Lordships have, I think, been referred to all the reported cases on the subject; and I think it is safe to say that, stated in the wide form which Sir George Jessel employed, it is not to be found in any previous authority. There are, I think, three typical cases which directly deal with the point: *Underhill* v. *Horwood* (2); *Carew's* case (*No.* 2) (3) and *Evans* v. *Bremridge.* (4) Most of the cases relate to persons who were undertaking obligations of guarantee or suretyship on the terms, plain from the instrument or instruments themselves, that others would share their liability. There are some other cases, but in all of them it was sought to impose on a man a greater liability than he had ever intended to bear, where his intention was not in doubt, and where, if he were not able to get equitable relief, he would suffer substantial loss.

It is necessary to mention here that apart from the equity relied on there is no doubt as to the position at law. The settlement having been delivered unconditionally and not as an escrow it was, as the Master of the Rolls said "unquestionably "the deed of the settlor." The settlement, according to its terms, had the effect of vesting equitable rights of property in the lady and the infant. The deed, as the Master of the Rolls also pointed out, was effective to convey the property and to bind the settlor according to its terms, notwithstanding that the lady did not execute it; and he cited some out of the many authorities which showed beyond doubt the legal view of the effect of such a deed. It became, as he said "immediately effective according to its terms so far as the "settlor was concerned," and "effective to divest him of his "equitable interest immediately upon its execution by him "and vest it in the beneficiaries." My Lords, I think all your Lordships, are of opinion that the judgment I have referred to up to this point is unquestionably correct. The contrary view entertained by Scott and Clauson L.JJ., who treated the matter as analogous to one of offer and acceptance, is a little difficult to follow in the case of a deed with declarations of trust; and learned counsel for the bank found himself unable to support it. I think it sufficient to say, following the Master of the Rolls, and without repeating the remarks on this point of my noble and learned friend Lord Russell of Killowen, that it appears to me that there was an unconditional declaration of trust by the settlement, and nothing remained to be done by the settlor. Miss Wilson no doubt could, but the infant could not, disclaim; and there was clearly no disclaimer by Miss Wilson of the grant to her.

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(1) 11 Ch. D. 121, 125.
(2) 10 Ves. 209, 225.
(3) 7 De G. M. & G. 43, 52.
(4) (1855) 2 K. & J. 174; 8 De G. M. & G. 100.

Having said this, I must now return to the equity relied on, and first I must remark, that this is clearly one of those equities whereby the Court of Chancery was accustomed by injunctions in personam (in effect) to override judgments at common law in order to correct its harshness or to prevent the legal right being made an instrument of oppression. There are a great number of examples to be found in the books; but I do not think there can be found one in which the Court of Chancery interfered with the legal right unless it was satisfied that it was necessary to prevent serious injustice.

My Lords, with all respect to the memory of a distinguished judge, I must state my opinion that the principle is too widely stated by Sir George Jessel; and I doubt the wisdom of any attempt rigidly to define it. The sentence "if two persons "execute a deed *on the faith* that a third will do so" probably "means in the expectation that a third will do so and with the "intention that the two persons will not otherwise be bound." Sir George Jessel adds the words "and that is known to the "other parties"; but I do not think, as the authorities above cited show, that that addition is justified in all cases. It may be observed parenthetically that in the present case there is no evidence to show that Miss Wilson knew that the settlor had executed the settlement "on the faith" that she too would do so. However, I think two propositions as regards the equity in question may safely be asserted, one, that the intention of the person who is setting it up is not a matter of mere conjecture, and two, that the equity comes into play only when in its absence the legal effect of the unconditional execution of the deed will lead to substantial injustice.

On the first point it is sufficient to cite a passage from the judgment of James L.J. in *Ex parte Harding*. (1) One Fleming, a partner in a firm of Nicol & Co. in which there were four other partners had signed a guarantee in which two only of the other partners had joined. The Lord Justice observed: "But it is said that by the original agreement it was intended "that all the five partners in Nicol & Co. should join in the "guarantee, and as only three of them did join, the liability "cannot be enforced against those three. The answer is that "that is an equity which must be alleged and proved. If "three persons sign a document, and it is said that they are "not liable, because the intention always was that they should "not be liable unless some other persons should also sign, that "is an equity to get rid of a legal liability. Fleming has not "alleged anything of the kind. . . . ."

On the second point I think the nature of the equity is itself enough to prove that the equity cannot be invoked on a matter of form rather than substance. If authority is needed I think the case of *Cooper* v. *Evans* (2) may be referred to. The facts in that case might perhaps have justified a different conclusion, but in principle I have no doubt that the

(1) (1879) 12 Ch. D. 557, 564.
(2) L. R. 4 Eq. 45.

decision was correct. It is hardly necessary to say that the Judicature Acts have not altered the grounds on which the equitable principle is applicable. I will add that I am unable to see any ground on which the equity relied on could ever be applied so as to destroy an equitable interest unconditionally created in favour of a person who, not being a party to the deed, was of course not intended to execute it.

My Lords, in the view I have expressed that the execution of the settlement by Miss Wilson was a matter of no importance to the settlor, and of the fact that he, though called as a witness at the trial, gave no evidence that he executed the settlement on the faith that Miss Wilson would also execute it, I am of opinion that there is no ground in this case for the application of the equity in question, which seems to have been due to the ingenuity of counsel rather than to the true intentions of the parties. For myself I see no reason to suppose that the settlor cared two straws whether the lady executed the document or not. He was making a generous provision for the infant in whose future he was at that time greatly interested; and I cannot believe that he would have desired this provision to fail merely because Miss Wilson was seeking as a condition of her execution to have the deed of covenant destroyed for reasons which probably commanded his sympathy. If he made any inquiry on the matter from his solicitors he would certainly have been told that the lady could not claim both under the deed of covenant and the settlement, and that it was perfectly obvious to all concerned that it was to her interest to claim under the latter. In any case it mattered nothing to him, since, as I have pointed out, she could not claim to be paid under both instruments. The view of the Court of Appeal as to the intention of the settlor in this matter is, with all respect, only founded on conjecture. I do not think any of your Lordships are disposed to make the same conjecture; and it seems clear to me that an equity to set aside an executed deed cannot be applied on so doubtful a foundation.

But I regret to find myself differing on another point with the Court of Appeal. Let us assume that the equity was applicable, and that the settlor could insist on the execution of the settlement by the lady, what then? Is there anything on the facts to show that she declined to execute it? She tried no doubt to get the settlor to agree to the destruction of the deed of covenant. This desire on her part could only be rational if the settlement was to be effective. The negotiations on this minor point came to a head and were settled between the settlor and the lady in December, 1925, and her letter to the settlor of the 23rd of that month coupled with her evidence shows quite clearly that she was relying on the settlement, and, as the learned trial judge held, that she was willing to sign it. She travelled on the continent after that date, leaving the settlement behind and there was much delay; but she was paid by the Bank as trustees 130*l.* a quarter out of the income of the stock in settlement. My noble and learned friend Lord Russell in his judgment has commented on the correspondence, and I agree with his remarks. I will add, however, that to me it is clear that Miss Wilson never refused to execute the settlement, and that the assertions on behalf of the settlor that she had done so are wholly inaccurate. The statements that she "refused to have anything more to do "with the proposed settlement and does not intend to carry "it through" are even more ill-founded. As I have said, she was actually receiving 130*l.* a quarter from the Bank out of the income of the settlement. Never from first to last was she told that the settlor peremptorily required her to execute the document, nor did he or his solicitors seek to make its execution by her within a limited time a matter of the essence of the contract. When the solicitors for the settlor were endeavouring to get for him the proceeds of sale of the settled stock and wrote to her solicitors on the matter in February, 1927, they received the answer that the lady was prepared to execute the settlement. The contention then raised was that the settlement was merely an offer, a proposed settlement, which the settlor had "revoked." These contentions seem to me to be without foundation, and I need not further deal with them. Reliance is, however, placed on the fact that the solicitors for Miss Wilson, on May 16, 1927, returned the settlement to the settlor unexecuted, and that she thus made clear her intention not to execute it. Quite apart from the difficulty that she could not put an end to the equitable assignment in favour of the infant, I do not so understand the letter. The settlement was returned as the result of demands and threats of divers legal proceedings, and after a distinct offer by her on April 20, 1927, to execute the settlement. Moreover, it had been repeatedly and erroneously stated that the settlor had revoked the document, which, of course, implied that he was entitled to revoke it, and that the document was valueless, while as a piece of paper it was the property of the settlor. In these circumstances I can attach no importance to the fact that the settlement was returned in a letter which plainly reserved the rights of Miss Wilson and the infant to have a settlement in the same terms executed by the settlor.

The decision of the Court of Appeal was naturally affected by the view that they were bound by the decision of that Court in the case of *Luke* v. *South Kensington Hotel Co.* (1), and by their desire to follow the statement by Sir George Jessel of the equity, which I think they looked upon as entitling the settlor to say he was no longer bound by the deed which he had sealed and delivered. For the reasons I have given I cannot agree with this view. I think that the equitable interests created by the settlement were never destroyed and that whether or not Miss Wilson executed the settlement; in my view of the facts she never refused to execute it; in my opinion even if she was bound to execute it, time was not of the essence and her formal offer to execute it in February, 1927, was not too late.

The Bank unfortunately were not fully informed as to the facts by the solicitors of the settlor. They had, however, full notice of the settlement and its contents before they handed back the proceeds of sale of the stock to the settlor. They paid until November, 1926, the quarterly sums payable under the settlement to Miss Wilson. They were given copies of certain letters inaccurately alleged to show a definite refusal by her to execute the settlement. They realized on November 16,

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(1) 11 Ch. D. 121.

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1926, that they ought to obtain her consent to handing the proceeds to the settlor. How they thought this would protect them against a claim on behalf of the infant does not appear. They rightly stated on November 18, 1926, that it was " quite clear that they had notice of the settlement." With some trouble they obtained a copy of it. On January 24, 1927, they obtained from the solicitors for the settlor a promise to give notice to Miss Wilson of the proposed withdrawal of the trust funds by the settlor. Strangely enough they gave an undertaking not to communicate with their supposed beneficiary on the subject of the proposed withdrawal. They preferred to accept the statements of the solicitors for the settlor, coupled with an indemnity given by him, to taking the usual course. Ultimately on June 11, 1927, they took the step of writing to the solicitors for the lady to say that they proposed to pay over the fund to the settlor within a week unless proceedings were commenced to restrain them from doing so. They were left to take their own course. No proceedings were taken, and the settlor received the trust funds. The problem which was presented as regards the deed of covenant, whether it was or was not at an end from the date when the settlement was executed, was never solved. Nor did the Bank's advisers, as far as one can see, tackle the question as to how the declaration of trust in favour of the infant had been rendered null and void. I agree with the learned judge who tried the case both on the facts and on the law, and I do not see how the Bank can escape liability.

My Lords, there was great delay by the lady in asserting her rights against the Bank ; and her numerous changes of solicitors, with, it would seem, somewhat contradictory instructions, were probably not conducive to her interests in the matter. I am glad to note that the Bank from the start generously stated that, if the infant's claim was held to be a good one, they did not desire to take the point that the lady might by her conduct have disentitled herself to relief. It was therefore unnecessary to consider whether there was anything special in the lady's conduct which might have prevented her succeeding on her counterclaim.

For the above reasons, My Lords, I was of opinion that the appeal should succeed and that the order of Morton J. should be restored with costs here and below.

LORD RUSSELL OF KILLOWEN. My Lords, the question which was in issue on this appeal can be shortly stated. It was whether the plaintiffs (the Bank) were trustees of a sum of India stock for the defendants, and acted in breach of their trust in paying over the proceeds of sale of that stock to the former owner thereof. Morton J. decided both questions in the affirmative and (on a counterclaim by the defendants to the action) gave relief against the Bank upon that footing. The Court of Appeal discharged the judgment of Morton J. and dismissed the counterclaim. The defendants then appealed to your Lordships' House.

Although the issue can thus be shortly stated, it will, I fear, be necessary to mention the relevant facts in some detail, in order to make clear the grounds for my opinion that the judgment of Morton J. was right.

On February 1, 1923, a gentleman (whom I will without prejudice refer to as the settlor) executed a deed of covenant with the first appellant (therein called the beneficiary) under which he covenanted to pay to her as from March 31, 1923, such a weekly sum, as after payment of income tax thereon, would leave the clear sum of 10*l*. a week. This sum was to be paid to her during her lifetime (or until she should do or permit some act or event whether voluntary or involuntary by which the same if her absolute property would be forfeited or vested in or payable to some other person or persons or a corporation or inconsistently with her personal enjoyment of the whole) or "until the execution by the settlor of a settlement in accordance with his option in that behalf" thereinafter contained. The option referred to was contained in clause 4, which with clause 5 must be quoted verbatim. They run thus: "4. Provided always that in case the settlor shall "by will bequeath or by settlement secure to the beneficiary "during her life an annuity of equal or greater amount than "the weekly sum hereby made payable as aforesaid then the

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"annuity so bequeathed or secured shall be in satisfaction of "such weekly sum which shall in that case cease to be payable "from such date." "5. Any provision made by the settlor for "the beneficiary as in the last clause is contemplated may "contain any trusts not repugnant to the preceding text "which the settlor may desire and any declaration by him "that the same is in satisfaction of the provisions hereinbefore "contained shall be final binding and conclusive on all "parties."

In the autumn of 1923, the settlor became desirous of making a settlement in favour of the first appellant and the infant appellant, and with a view thereto procured to be inscribed in the Bank's name a sum of 15,000*l.* India 4½ per cent. stock to be held meanwhile to the settlor's order pending further instructions. As the Bank stated in their letter to the first appellant of May 6, 1924: "the settlement has not yet "been executed, and for the time being we are merely holding "the stock at the disposal of the settlor." Some delay occurred before the draft of the settlement had been approved by all parties, but ultimately the settlement was engrossed and executed by the settlor on or shortly before August 12, 1925. It was admitted that the deed was signed, sealed and unconditionally delivered by the settlor. About that there was no dispute. The appeal was to be decided on that footing. The settlor's execution was not attested, nor was the deed dated, but neither fact is in any way material.

The contents of the deed must now be noticed. It is expressed to be made between the settlor of the first part the first appellant (therein called "the first beneficiary") of the second part and the Bank of the third part. It recites (first) the deed of covenant of February 1, 1923, and, in particular, clauses 4 and 5 thereof; (secondly) that the settlor was desirous to make such provision as thereinafter contained as well for the first appellant as for the infant appellant and had for that purpose transferred the India stock into the name of the Bank to be held and applied by the Bank upon the trusts thereinafter declared and the settlor had agreed with the first appellant to enter into the covenants on his part thereinafter contained; and (thirdly) that it had been further agreed between them that in consideration of the provision made by those presents the first appellant should release as thereinafter appearing the settlor his executors and administrators from all liability and claims under the deed of covenant of February 1, 1923, and that forthwith upon the execution of those presents the said deed of covenant should cease to have effect. The document then proceeds thus: "Now this "indenture made in pursuance of the said agreement and in "consideration of the premises witnesseth and it is hereby "agreed and declared as follows": Trusts are then declared of the India stock in favour of both the appellants. The first appellant is given a determinable life interest in the income of the stock, which is to be applied by the Bank in payment to her, so far as it will extend, of the clear weekly sum of 10*l.* and also the balance, if any, remaining at the end of each year, the settlor covenanting to pay to the Bank the moneys (if any) necessary to provide the clear 10*l.* a week for each year. As to the infant appellant it is sufficient to say that trusts and provisions are declared and contained for his benefit both as to income and capital of the whole of the trust fund. Clauses 16 and 17 are important, and I cite them verbatim. They run thus: "16. In consideration of the "settlement by these presents made by the settlor and the "covenants on his part herein contained the first beneficiary "hereby releases the settlor his executors and administrators "and his estate from all the covenants on his part con-"tained in the hereinbefore recited indenture of the 1st day of "February, 1923, and from all claims and demands thereunder." "17. In consideration of the premises it is hereby agreed and "declared by and between the settlor and the first beneficiary "that as from the execution of these presents the hereinbefore "recited indenture of the 1st day of February, 1923, and all "the provisions therein contained shall cease to have effect."

The settlement so executed by the settlor was sent to the first appellant for execution by her. She at first wished the deed of covenant to be destroyed, a proceeding to which the settlor's advisers (Messrs. Lewis and Lewis) would not consent;

and on November 16, 1925, her solicitor, Mr. Jacobs, wrote to Lewis and Lewis a letter in which he said: "My client's "instructions to me are that unless the first document is "destroyed now she does not wish either copy to be in the "hands of anyone except herself, and I am afraid that "she will not proceed further with the present document "unless she is satisfied on this point." Ultimately she came to an agreement personally with the settlor by which it was arranged that the deed of covenant should be deposited with the Bank in a box with two locks with different keys, each party keeping a key for one lock only, so that the box could never be opened without their joint consent. Having been satisfied upon this point she was ready and willing to execute the settlement. Unfortunately, she was at that time unable to say where the document was. She had received it in Deauville and had brought it back to London. She had then gone abroad again to Paris, St. Moritz, and Algiers, and indeed seems to have forgotten all about executing it herself. The judge, however, after hearing her evidence found as a fact that as from a date about the end of 1925, she was always ready and willing to execute the settlement, and would have done so if she had been asked to do so.

Meanwhile, the Bank, acting on the settlor's instructions, had ever since the middle of May, 1924, been paying out of the income of the India stock the quarterly sum of 130*l.* to the credit of a banking account of the first appellant; and they continued so to do until November 1, 1926. In that month, however, they received a letter from Lewis and Lewis (dated November 9, 1926), which stated that acting under their advice the settlor was "proposing to make other arrangements." At this point it is only right to state that the late Sir George Lewis was the only member of that firm who conducted the correspondence and acted on behalf of the settlor. The letter of November 9, 1926, was followed by a letter requesting the Bank to sell the India stock and remit the proceeds to the settlor. The Bank, strange to relate, immediately sold the stock; but some glimmer of the duties and responsibilities attaching to trusteeship seems suddenly to have reached its Trustee

Department, for on November 16, 1926, they wrote a letter to Lewis and Lewis stating that it had occurred to them that before handing the proceeds to the settlor the consent in writing of the first appellant should be obtained, that they had been paying the income of the stock to her for some time, and they asked Lewis and Lewis to advise. I do not comment on the strange attitude here adopted of asking the advisers of the person who was claiming the fund, to advise the Bank upon the validity of a possible claim by a third party. The danger is apparent from the answer received from Lewis and Lewis, who in a letter dated November 17, 1926, said that the Bank were under no liability to the first appellant and that her consent was unnecessary, and asked for an assurance that the Bank would not communicate with her. It is difficult to speak with restraint of this letter and request, which can only have been written and made by a writer who had forgotten that the settlement had been signed, sealed and delivered unconditionally by the settlor, or who failed to appreciate the effect in law of that act.

Most unfortunately, the Bank, by letter of November 18, 1926, gave an undertaking not to communicate with the first appellant without referring to the settlor's solicitors, a strange proceeding by trustees of stock who, to put it at the lowest, had an uneasy feeling that they might be trustees of it for the very person with whom communication was forbidden. They still, however, kept the proceeds of the stock, and asked to be told whether the settlement had been executed by the settlor. On December 21, 1926, Lewis and Lewis wrote to the Bank that the first appellant had declined to execute the settlement and that the settlor " has since refused to have anything more "to do with the proposed settlement and does not intend to "carry it through." On December 24, 1926, the Bank pressed for an answer to the question which they had asked some five weeks previously, namely, whether the settlement was or was not actually executed by the settlor. The answer was given in a letter of December 30, 1926, in which the late Sir George Lewis states that while he was unaware of the facts until recently he had then ascertained them. He enclosed

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copies of four letters passing between his firm and Mr. Jacobs, the solicitor for the first appellant, dated November 13, 14, 16 and 17, 1925. The position then, he states, was as follows: The deed had been engrossed and executed by the settlor and sent on August 12, 1925, for execution by the first appellant. She refused to sign it then, and from the time when her solicitor wrote on November 16, 1925: "I "am afraid she will not proceed further with the present "document" the settlor had regarded the proposed settlement as at an end.

It will be observed that Sir George Lewis (although he enclosed a copy of the letter) did, in quoting Mr. Jacobs' letter of November 16, 1925, omit the words "unless she "is satisfied on this point"; and, as I have pointed out, the trial judge found upon the evidence that she was so satisfied and had come to an agreement with the settlor upon the point. Moreover, the judge held that a letter had been written by the first appellant, as she was starting for St. Moritz from Paris, on or about December 23, 1925, to the settlor, and had been received by him, in which she thanked the settlor for arranging for the tin box device, and treated the settlement executed by him as an existing and effective document. The phrase used by her was, "I didn't have time to dig out that "settlement you signed, but I will; and do I keep it?" All that is quite inconsistent with the suggestion that from November 16, 1925, the settlor had regarded the settlement as at an end.

Ultimately the Bank, having obtained a copy of the settlement, obtained separate advice. From the correspondence it would appear that they were advised that the settlor should give a notice to the first beneficiary "revoking the offer of "settlement." The Bank informed Lewis and Lewis that provided such notice were given and no proceedings were threatened by the first appellant within one month, they would hand over the fund to the settlor on his indemnity against costs of possible litigation and otherwise. No such notice was ever sent; but as the result of certain correspondence between Sir George Lewis and the late Sir John Withers (who was then acting for the first appellant) the deed of settlement which had been executed by the settlor was handed over by Sir John Withers to the settlor's solicitors with a letter dated May 16, 1927. I will have to refer to this correspondence and letter and to the circumstances in which the deed was handed over in connection with another aspect of this case. For the moment I merely state the fact.

On May 17, 1927, Lewis and Lewis wrote to the Bank, stating that they had written to the solicitors of the first appellant "revoking the offer of the settlement," and that they had obtained the return of the document, and asking for the proceeds of the stock. The Bank in reply asked for a copy of the notice of revocation. Lewis and Lewis insisted that the settlor's withdrawal of what they termed "the offer of the "settlement" and Sir John Withers' knowledge of it were sufficiently proved by the following extract from a letter to his firm of February 1, 1927, namely: "As a matter of fact "the terms of the proposed new settlement were refused by "your client, and our client, as we wrote to Mr. Jacobs, "declined to agree the alterations which [the first appellant] "suggested. In the result [her] solicitor wrote to us that she "was not prepared to proceed further with the document, "and [the settlor] therefore revoked the offer of the settle- "ment."

Here again we meet an imperfect reference to Mr. Jacobs' letter of November 16, 1925, and the statement to the Bank (in the letter of December 30, 1926), that the settlor had "regarded the proposed settlement as at an end" has now developed into an assertion that he "therefore revoked the "offer of the settlement." We know from the evidence and findings of Morton J. how completely at variance with the true facts the statements prove to be.

The Bank were by no means satisfied, but nevertheless they were advised to inform Withers and Co. of their intention to hand over the funds to the settlor unless proceedings were taken within a limited time to restrain them from so doing. The Bank accordingly wrote to Withers and Co. on June 11, 1927, that they would hand over the funds to the settlor "unless during the course of next week proceedings are "commenced to restrain the Bank from so doing." To this Withers and Co. replied that they had nothing to add to their letter to Lewis and Lewis of May 16, 1927. The Bank, having obtained a copy of that letter for the first time, repeated their intention of handing over the funds to the settlor; and on June 27, 1927, on receiving the settlor's indemnity they paid over the proceeds of sale of the stock with interest and accumulated income to his solicitors.

My Lords, that is the whole story as regards the Bank. Their intimation of their intention to part with the fund can afford them no protection, and the first question to determine is whether there was an effective settlement of the stock made by the settlor when he signed, sealed and unconditionally delivered the deed. If such a settlement was made, the Bank admittedly and incontestably had notice of it, and of the beneficial interests thereby vested in the appellants in the India stock which was held by the Bank. They became trustees of the stock for the appellants and they can have no defence to the claim against them unless on some ground or another the appellants have become deprived of those interests or disentitled to assert them.

Morton J. and the Master of the Rolls were in agreement upon this first question. Morton J. in his careful and closely reasoned judgment held that on the execution by the settlor a valid settlement came into being, and the stock became impressed with trusts which the settlor was incapable of revoking; and that any mistaken view of the legal position which may have been taken by the settlor or the first appellant mattered not; the trusts remained in existence. The Master of the Rolls took the same view, namely, that on the execution of the settlement by the settlor his then equitable interests in the stock became vested in the beneficiaries under the trusts declared in the deed. The judgment of Scott and Clauson L.JJ. rests on the view that upon the true construction of the deed no trust was to come into being except if, and when, the deed had been executed by the first appellant as well as by the settlor, and that accordingly the non-execution by the first appellant left the deed wholly inoperative; and they liken the case to a written offer by one to another followed by nothing more. I can see no justification for this view. The language of the deed in no way supports it. The recital of clauses 4 and 5 of the deed of covenant and the presence in the settlement of clause 17 indicate that the trusts are being created by the settlor in exercise of his powers under the deed of covenant. The trusts declared under clauses 1, 2 and 3 are immediate trusts; they are not made subject to any condition as to the happening of any event or otherwise. They sprang into existence the moment that the settlor unconditionally delivered the deed. The Lords Justices appear to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance, with time being in some way of the essence of the contract; whereas the case is really one of a divesting and vesting of property. Indeed, in your Lordships' House counsel for the Bank stated that they could not and did not attempt to support the reasoning of the judgment of the Lords Justices. That the view of Morton J. and the Master of the Rolls is correct, admits in my opinion of no doubt. Once the settlor signed, sealed and unconditionally delivered the deed, the trusts in favour of the appellants were constituted; the appellants became the persons beneficially interested in the stock, and it did not lie in the power of the settlor to undo what he had done. He had no power to revoke the trusts unless such a power was contained in the deed.

The Master of the Rolls, however, based his decision in favour of the Bank on reasons which I must now examine. He held that although there were trusts completely constituted in favour of the appellants, nevertheless by reason of subsequent matters the settlor was entitled as against both appellants to treat the settlement as no longer effective, with the result that the Bank committed no breach of trust. As against the first appellant he put the case on two grounds, namely, (1.), the settlor executed the settlement on the faith that the first appellant would execute it and give the release for which he stipulated, and that since she had not in fact executed the deed the equitable principle came into operation which was referred to by Sir George Jessel in *Luke* v. *South Kensington Hotel Co.* (1) when he said: "It is well "settled that if two persons execute a deed on the faith that "a third will do so, and that is known to the other parties "to the deed, the deed does not bind in equity if the third "refuses to execute." And (2.), that her action in returning the settlement unexecuted and the language of the letter of May 16, 1927, showed an intention on her part to disclaim the benefits given to her by the settlement, and therefore (I presume) revested those benefits in the settlor.

I will consider the case thus made against the first appellant, taking the first ground first. "In my judgment," says the learned Master of the Rolls, "he executed the settlement of "1925 on the faith that he would get a release."

My Lords, this allegation or opinion that the settlor executed the settlement on the faith of getting a release is not founded on any evidence given by him, nor was it suggested to the first appellant when she gave evidence, nor is it to be found in any of the numerous letters from Lewis and Lewis. I am at a loss to know on what it rests. For myself, I cannot see any necessity for the release, or the value of it to the settlor. It is said that it was of importance because the determinable life interest given by the settlement was not a life annuity within clause 4 of the deed of covenant. I am not prepared to assent to this view; by the joint effect of clause 5 of the deed of covenant and clause 17 of the settlement, the settlement was a settlement within the option conferred by clause 4 of the deed of covenant, and that deed ceased to operate when the settlor executed the settlement. Even if it was not authorized by clause 4, it is impossible to conceive that rights could be asserted by the first appellant under the settlement without such assertion involving a release of all her claims under the earlier deed. But even if it be assumed that the settlor executed on the faith that he would get a release, and that the first appellant was aware of the fact, I am still unable to see how on that ground the settlement had become inoperative in June, 1927, when the Bank parted with the fund, or why the first appellant on that ground is prevented from asserting her rights thereunder. The actual decision in the *Luke* case (1) has no relevance here: it merely amounted to this, that since one of three trustees had refused to execute a deed dealing with trust property which was vested in the three, the trust estate was not bound by the execution of the two trustees who had executed the deed. The statement of Sir George Jessel as to a well settled principle is an obiter dictum and is in my opinion much too wide in scope. I know of no equitable principle so wide as that. We were referred to, and I have considered, all the authorities cited in Norton on Deeds, 2nd ed., p. 21, in relation to this alleged principle, and they do not justify so broad a proposition. I do not think that the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party, and owing to the non-execution by another person named as a party to the deed the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed. The most common instance is the case (such as *Evans* v. *Bremridge* (2)), where only one of two co-sureties named in the deed in fact executes the deed, and it is sought to enforce the deed against the one who did execute. I know of no such equity against a non-executing party who seeks to enforce benefits conferred upon him by the deed. There is no foundation on which the equity could rest in such a case, for by his action he is affirming and adopting the deed and every provision of it, and is bound by it as effectually as if he had executed it.

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(1) 11 Ch. D. 121, 125.

The second ground upon which the Master of the Rolls based his judgment is disclaimer by the first appellant. This ground is in my opinion ill-founded in the circumstances of this case. It involves, however, an examination of the correspondence which passed between Sir George Lewis and Sir John Withers, and the evidence in order to ascertain whether any disclaimer by or on behalf of the first appellant ever took place.

(1) 11 Ch. D. 121. (2) 8 De G. M. & G. 100.

Proceedings had been taken by the settlor which had resulted in the infant appellant having been made a ward of Court in or about the month of November, 1926. In those proceedings Sir John Withers was acting for the first appellant. While Sir George Lewis was endeavouring to induce the Bank to hand over the proceeds of the stock, Lewis and Lewis wrote to Sir John Withers a letter dated February 1, 1927. As this letter initiated the correspondence which resulted in the first appellant at the instance of her adviser parting with the possession of the deed, and in making the alleged disclaimer, it must be quoted in full. I do not think it is misdescribing it when I say that the story thereby told to Sir John Withers is wholly inaccurate, a fact which I think must be ascribed to ignorance or lack of legal appreciation on the part of the writer.

The letter runs thus: "We are writing to you with regard "to a matter which is quite separate from the question which "we have been dealing with on the custody summons. Our "attention has been called to the fact that for some considerable "time previous to August 1925 negotiations were passing "between ourselves on behalf of [the settlor] and Mr. M. A. "Jacobs the solicitor then acting for [the first appellant] as "to a settlement of February 1, 1923. As a matter of fact "the terms of the proposed new settlement were refused by your "client, and our client as we wrote to Mr. Jacobs declined "to agree the alterations which [the first appellant] suggested. "In the result [her] solicitor wrote to us that she was not "prepared to proceed further with the document, and [the "settlor] therefore revoked the offer of the settlement, and "since Mr. Jacobs' letter of November 16, 1925, the negotiations "have been closed and the question of a further settlement "has been at an end. The position with regard to this matter "was attended to by the conveyance department of our "office and Sir George Lewis knew nothing of these matters "until the question which arose on the pending summons with "regard to the child, and he thought that it would be best "that the proposed settlement which had been signed by "[the settlor] and which was sent to Mr. Jacobs for [the "first appellant's] signature should be returned. Mr. Jacobs "however informs us that the document was at the time sent "to [the first appellant] and that he has heard nothing of it "since her instructions to refuse to proceed further with the "proposed settlement. We feel sure that you will agree that "it is desirable that this document should be returned as "[the settlor] had revoked the offer contained in it, and your "client has refused to proceed with it, and we shall be very "much obliged if you will kindly obtain from [the first appellant] "the document which was sent to her, and return it to us."

I need not pause to point out to your Lordships how far from the truth it was to say that the settlor had offered to make a settlement, that the offer had been refused by the letter of November 16, 1925, that the settlor had therefore revoked the offer, and that the negotiations had ever since been closed. We now know that, so far from the settlor then resiling in any way, as between him and the first appellant their difference in regard to the fate of the deed of covenant had been settled and the substituted settlement was an accomplished fact.

Sir John Withers saw his client who told him the true position; and he asked that the matter be completed. Lewis and Lewis, however, in their reply stuck to their story, and pressed for the return of the document. On March 2, 1927, Sir John Withers endeavoured to obtain information from the Bank, but the Bank were unable to give it, owing to the undertaking which had (most improperly) been asked for and given that they would not communicate with the first appellant. He therefore wrote to Lewis and Lewis (on March 2, 1927), expressing his natural surprise at the undertaking, stating that he understood from what they had told him that the settlement had been merely executed as an escrow, and asking for the following information: "(*a*) Were any funds and, "if so, what funds transferred to the Bank by [the settlor] "for the purposes of the deed and what is the position of "these funds now? (*b*) a copy of all correspondence 'with " 'the Bank' as to the deed or the fund, and (*c*) a copy of "any document" of revocation.

In their answer Lewis and Lewis gave none of the information asked for, except that the India stock was held by the Bank in 1923 to the order of the settlor, and had since been sold on his instructions. The letter (dated March 7, 1927) concludes with these observations: "We maintain that it is absolutely "clear that [the first appellant] refused to proceed with the "proposed settlement, and that this is confirmed by what "[her] solicitors wrote in 1925, and the proposal of [the "settlor] has been revoked. If [she] is not prepared to instruct "you to return to us the documents for which we have asked "we shall know what course to adopt. In the meantime we "rely upon your retaining the document in your possession "as arranged."

Sir John Withers wrote on March 17, 1927, that since Lewis and Lewis would not give the information he could do nothing: but on April 20, 1927, he wrote stating that the first appellant was willing to sign the settlement and asked whether the settlor would give effect thereto. Lewis and Lewis replied by repeating that the settlor had revoked his proposal.

Sir John Withers then approached his client. As appears from his letters, and I think also from his oral evidence (though his evidence is that of a man who has no clear recollection at all of the events of 1927), his view was that the document, although executed by the settlor, was incomplete and of no binding effect, either because it was merely executed as an escrow, or because it was undated, and unattested, or for some or all of those reasons. He was, therefore, quite prepared to accept the view that the matter still lay in contract and had never got beyond an offer by the settlor, withdrawn by him before acceptance. He had consulted counsel and had apparently been advised that the first appellant should return the document with a letter in a form settled by counsel. I refer to the terms of this letter later. For the moment I content myself with saying that it is hard to conceive that counsel would have so advised had he (or the solicitor who instructed him) been aware that the deed had been signed, sealed and unconditionally delivered by the settlor.

Sir John wrote letters to his client on April 27 and May 4, 9, 10 and 11, 1927. They urge her to authorize him to hand over the document, and they so urge her on the footing that the settlor was not bound, that he was entitled to refuse to carry out a proposal to settle; in short that the view insisted upon by Sir George Lewis was correct.

Matters came to a head when on May 12, 1927, the first appellant asked him to hand the document over to her. Thereupon Sir John (after telling his client that he was doing so) wrote to Sir George: "[My client] asked me to-day to hand "her the incomplete deed signed by [the settlor]. I told her "that I cannot do so at present but I shall do so on Monday "unless I am otherwise prevented."

In reply Sir George Lewis, caused him to be served with a subpœna duces to produce the document before the judge before whom an application as to maintenance of the infant was pending in the wardship proceedings. Thereupon Sir John wrote to his client a letter dated May 13, 1927, informing her of this, and that, he therefore could not part with the deed; the letter continued: "I have done my very utmost "for you, spared no personal trouble, and have got the case "on proper good reasonable lines, but it is obvious that you "will not take my advice and that of [counsel] and therefore "under those circumstances, I am afraid there is no alterative "but to say, with great regret, that I cannot act for you, "and must ask you to make other arrangements."

Yielding to this pressure the first appellant gave her consent in a letter to Sir John Withers of May 14, 1927, which ran thus: "I have received your letter but really cannot understand "the letter at all. I gather from our conversation that nothing "was going to be done about the document until Monday, "but I quite appreciate now that it must be returned at once, "so will you have a certified copy made and send off the "document to Messrs. Lewis & Lewis with a letter as suggested "by [counsel], or if this cannot be done at the moment, please "say I agree it shall go to them as soon as it has been produced "by the Court. This I hope will stop any fresh proceedings. "I sincerely trust you will not persist in your refusal "to continue to act for me as I do not know what I "shall do, as I have actually always relied on your advice. "I trust this letter shows I intend acting in accordance "with it."

Immediately on receipt of that letter Sir John Withers sent the document to Sir George Lewis accompanied by a letter dated May 16, 1927, which had been settled by counsel in the following terms: "Under the present circumstances we "are advised that [the first appellant] is not entitled to retain "the document executed by [the settlor], and we accordingly "return it in accordance with his request conveyed through "you. This however must not be taken as any admission "that [the settlor] is under no obligation to execute a settlement in the terms of that document, and the return of the "document is without prejudice to any question as to the "rights of [the first appellant] or the infant to have a settlement executed. We wish formally to repeat that [the first "appellant] is willing to execute a settlement in the terms of "the document executed by [the settlor]."

My Lords, I have given in detail the circumstances leading up to the handing over of the deed, because in my opinion when those circumstances are considered, it is impossible to say that there was any disclaimer by or on behalf of the first appellant of her interest under the settlement. In my opinion disclaimer can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it. So far as her legal advisers were concerned they were misled by the statements insisted upon by Sir George Lewis. They had not, and could not have, any knowledge of the unconditional delivery of the deed, and must have believed that in the circumstances the deed was inoperative, and that the whole matter was capable of revocation and had been effectively revoked, with the result that there could be no interests to disclaim. In this they were misinformed and mistaken; but their mistake cannot affect the rights of the beneficiaries under the deed. As regards the first appellant herself, so far from finding any intention on her part to give up her rights under the deed, the evidence points the other way. She had settled her difficulty with the settlor by the end of 1925, and ever since then was prepared to execute the document. It was overwhelmingly to her interest that the document should stand and be substituted for the deed of covenant, because under it provision was made for the infant; and when (in her letter of May 14, 1927), she gives her consent to the handing over, she makes it clear that she still treats the settlement as operative, because she stipulates that it shall be produced to the judge who in the wardship proceedings is to deal with the maintenance of the infant. Two passages from her oral evidence may well be quoted in this connection: (1.) "When Sir John Withers told me that I would lose my "boy if the deed was not handed over, and that he would "refuse to act for me, I did authorize him to hand it over, "but on the understanding that it would be produced in "Court"; and (2.) "I did place a lot of reliance on it [the "settlement] because it was a capital for my boy; and it "did not affect me, and it does not affect me now, but it does "affect my boy."

In my opinion the second reason given by the Master of the Rolls for deciding in favour of the Bank, is not well founded.

The case in favour of the infant appellant is an a fortiori case. Although no question of disclaimer by an infant could arise, the Master of the Rolls was of opinion that his rights must stand or fall by the action of the first appellant. I find a difficulty in accepting the view that assuming (as the Master of the Rolls held) that a trust had been completely constituted in favour of the infant, he can lose his beneficial interest thereunder by any action on the part of his mother: but since I have already expressed the opinion that the first appellant has not been deprived of her beneficial interest under the settlement by any action on her part, or by reason of the application of any equitable principle, it is unnecessary to pursue the matter any further.

My Lords, I have not forgotten that the Bank's attitude on this appeal was that if they could not defeat the infant's claim they would not resist the first appellant's claim to relief.

Notwithstanding this, being of opinion that the first appellant was entitled to succeed on the merits of her own case, I have thought it right to deal with the whole matter in detail, in stating the reasons why I was of opinion that the appeal should succeed, and why I voted for the restoration of the order of Morton J.

LORD WRIGHT (read by LORD ROMER). My Lords, I have had the privilege of reading in print the speech which has just been delivered by my noble and learned friend Lord Russell of Killowen. He has so completely and accurately analysed the tangled web of fact and misconception, which grew up in this case, primarily due to an erroneous view of the position stated and reiterated to all parties by the settlor's solicitors, that I do not desire to add anything on the facts. Lord Russell's statement agrees in all substantial respects with that contained in Morton J.'s careful and convincing judgment, with which, like my noble and learned friend, I am in agreement. I shall merely add some general observations on the case out of respect to the members of the Court of Appeal from whom I have the misfortune to differ.

The crucial issue is whether the deed of settlement was unconditional so as to vest immediately on execution the beneficial interest in the India stock in the appellants. In the Court of Appeal it has been held that it had not that effect. The Master of the Rolls so held, as I understand his judgment, on the ground that the settlement did not bind in equity because, though unconditional in law, it was in equity subject to a condition which was never fulfilled, namely, that it should be executed by the first appellant, or at least that that circumstance constituted an equitable ground for relief. Scott and Clauson L.JJ. on the contrary did not rely on any equitable principle, but on the construction which they adopted of the deed in law, being of opinion that it was bilateral, not unilateral, and was not binding until the first appellant by her execution of the deed released the pre-existing deed of covenant. These two views, though directly inconsistent, do however agree in holding that the deed did not take effect and was never binding. On neither view is it material to determine whether there was a disclaimer in the strict sense of the term by the first appellant of the benefits under the deed, because either view denies her any benefit except on terms of her executing it, which in fact she never did. Both views proceed on the assumption that the instrument was not an escrow. Indeed, the respondents have conceded that it was not delivered by the settlor as an escrow, but as his deed. In my opinion, the concession was right and indeed inevitable. Whether an instrument was delivered as an escrow is a question of fact. The old law as stated in Sheppard's Touchstone, p. 58, that an instrument could not be held to be an escrow unless it was delivered with express words so declaring, and was delivered to some person other than the person executing it, has now been abandoned. The character of the act of delivery depends on intention, which must be ascertained by considering the nature and all the circumstances of the case. This is the effect of *Bowker* v. *Burdekin* (1) and *Xenos* v. *Wickham*. (2) In this case there are no circumstances which could justify a finding of fact that the instrument was delivered as an escrow.

The issue whether the first appellant disclaimed the deed is only material if there was something to disclaim, that is, if there was a valid and binding settlement of a beneficial interest in her favour. On both views taken in the Court of Appeal, it is clearly not a material issue, though it might perhaps be material to ascertain if she effectively refused the benefit of the settlement. Her disclaimer could only affect her life interest. Thus, her disclaimer would not by itself entitle the respondents to succeed in the appeal, because it would not affect the rights of the second appellant, the infant, assuming that the deed gave him rights. In addition the respondents have stated throughout that if they do not succeed against the second appellant, they will not take the point that the first appellant was disentitled to relief. But notwithstanding, I feel that it is right to determine the question whether the first appellant disclaimed the deed.

(1) 11 M. & W. 128.

(2) (1866–7) L. R. 2 H. L. 296.

The contention that she did has been much pressed on behalf of the respondents, and she is entitled to have her position and rights vindicated.

In my opinion, the issue of disclaimer should be decided in favour of the first appellant. That issue depends on analysing what passed between the settlor or his solicitors on the one side and the first appellant or her solicitors on the other side. The respondents were not directly concerned with that aspect of the facts. A careful consideration satisfies me that no disclaimer has been made out. Disclaimer of a deed has been rightly described as a solemn irrevocable act. If it is alleged, the Court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention. In this case, I can find no evidence that the first appellant ever intended or desired to disclaim. In fact the judge has found with abundant evidence that she was always from about the latter part of November, 1925, willing to sign. If in the end she did not do so, it was because her will was overborne by the urgency of the counsel and solicitors who advised her. They made her believe, much against her will, that it would be dishonourable and improper as well as futile to attempt to execute an instrument which as they were led to believe was merely an escrow. That this was their belief is to my mind clear from her solicitors' letter of May 16, 1927, which I cannot explain on any other footing. The settlor's solicitors from some date late in 1926 were determined to get back the instrument without its being executed by the first appellant. I presume their intentions were of the best, but I cannot applaud their methods. The formula which they so persistently reiterated to the solicitors, both of the respondents and of the first appellant, that there was no settlement but merely a proposal for a settlement by the settlor which he had revoked, obviously had a convincing effect at the time on the solicitors both of the appellants and of the respondents. But in my opinion what the first appellant did, cannot in the circumstances be construed as a disclaimer of the settlement, and in any event, even if it were, could not be held to be binding, because she clearly acted under a material mistake. There is a further difficulty in the respondents' way on this point. As I understand the facts and the findings of the judge, the first appellant accepted the settlement in December, 1925, at a personal interview with the settlor, and arranged the difficulty or complaint raised in her solicitors' letter of November 16, 1925, which I cannot construe as a repudiation or rejection of the settlement. It was old law that a deed once accepted cannot be disclaimed (Sheppard's Touchstone, p. 70), and I see no ground to think the rule has been changed. It seems to me to be a sound rule. If either party desires at a later date to get rid of the deed, or to divest any estate or interest conveyed by it, that object must be achieved by some procedure between the parties other than disclaimer.

I pass to the crucial question, which is, what was the effect of the deed ? by which I mean the effect of the deed either in law or in equity. Its construction in law must first be determined, even though, as in this case, the deed deals with an equitable interest. Equity follows the law, and when it interferes, does so to qualify or modify the rights or liabilities which would flow from the legal construction of the deed.

A deed may no doubt be subject to conditions expressed in it. Thus, a deed may contain executory reciprocal conditions, as to which questions may arise whether they are dependent or independent, whether a breach excuses performance or whether it merely gives a claim for damages. And a deed which is a grant or settlement may contain conditions precedent to the passing of the property, or conditions subsequent or resolutive, providing for a divesting of the interest conveyed. But where there is an absolute and unconditional settlement, it takes effect at once by the act of the settlor executing it. This is complete when he delivers it as his deed. I disregard the possible effect of fraud or similar matters which may be availed of in proper cases to nullify the act of execution, and I disregard any question of disclaimer. The absolute settlement is as immediately effective as a completed gift of a chattel at law or an oral declaration of trust in equity. Questions of consideration are in this connection irrelevant. As Lord Eldon tersely said of deeds in *Cock* v. *Richards* (1): "Consideration is not necessary." The settlor or obligor, once the deed has been delivered by him as his deed, cannot revoke it: *Butler and Baker's Case* (2); *Xenos* v. *Wickham.* (3) One of the clearest and most striking statements and applications of these principles is to be found in *Bowker* v. *Burdekin* (4), where a partner executed a deed conveying to a trustee for the benefit of creditors all the personal property of the partners. He was held bound by it though it was clear that he only executed it on the footing that the other partners also executed it, which they failed to do. But there was no express condition to that effect. Parke B. said that an instrument executed as a deed cannot be denied its effect for transferring property according to its terms. If these principles are applied to the deed in question, it seems to be clear that its terms involve an unconditional settlement.

But in the opinion of Scott L.J. and Clauson L.J. that is not its true effect in law. In their view, it was not intended to be a unilateral declaration of trust which would have effect whether or not the first appellant executed it, but was to be construed as a consensual document requiring for its operation that the first appellant should concur in it by executing it. This criticism is not, as I follow it, based on any express condition precedent. Clearly there was none. It is based on an argumentative interpretation of the deed which presupposes that its intention was only to create the trust if it superseded the obligations under the deed of covenant of 1923, and that this supersession could only be effected by the execution of the deed by the first appellant. The declaration of trust was only to bind the settlor when the deed was executed by the other party, the first appellant, and, until that happened, the position was analogous to that which arises when one party makes a written offer to another party and the latter does nothing more. There, it is said, there is

(1) (1805) 10 Ves. 429, 438.
(2) (1591) 3 Co. Rep. 26 (*b*).
(3) L. R. 2 H. L. 296.
(4) 11 M. & W. 128.

no acceptance, no consensus, and no legal result. It seems to be assumed that there was some time limit within which execution was to take place, or perhaps it had to take place before the date of the writ or counterclaim. Counsel for the respondents showed themselves somewhat reluctant to uphold this view of the Lords Justices, but I think I have stated it with sufficient accuracy.

I find it quite impossible, with all respect, to agree with it. The deed might well have been drawn in such a way as expressly to make the declaration of trust conditional on the first appellant executing it. In that case it would not have taken effect unless she had done so. But there is nothing of the sort expressed in the deed. On the contrary, the declaration of trust is absolute and unconditional in terms. It may have been expected that the first appellant would execute the deed, but it was certainly not made a condition of the conveyance. In my opinion the settlement was unilateral. I think it is misleading to import into the law of deeds analogies from an entirely different region of law, that of simple contracts. They indeed are consensual and depend on a meeting of minds in a common intent, evidenced by words or conduct. It is from this mutual consent that the rights and duties under the agreement arise. This might be the position in a case of a simple agreement to convey property. But the deed in question is something different. The declaration of trust by the settlor depended not on the other party's consent any more than on mutual consideration. It depended on the act of the settlor in executing the settlement. The beneficiary might, it is true, disclaim, but her acceptance was immaterial except perhaps as ruling out disclaimer. There is nothing in the deed which could be construed as an express condition and no legal principle on which a condition such as is suggested could be implied. The law as to obligations or transfers under seal was fixed in days before the nature of the consensual contract was realized. In my judgment, the views of the Lords Justices cannot be supported.

On the other hand the Master of the Rolls took a different view. He did not find on the true construction of the deed any condition in law. He held that immediately on execution by the settlor the settlement was completely constituted in favour of the appellants. But he went on to deal with what he described as a different matter altogether, and found that the deed was clearly executed by the settlor on the faith that the first appellant would also execute it. He then proceeded to hold that, because she had not, it was not binding on the settlor in favour of either the first or the second appellant. The deed was never binding at all because equity would relieve against it. While he did not, at least primarily, base this conclusion on the equitable principle which he found to be expressed by Sir George Jessel M.R. in *Luke* v. *South Kensington Hotel Co.* (1) which has been quoted by my noble and learned friend Lord Russell of Killowen in his speech, I think he was proceeding on some such principle. In *Luke's* case (1) the dictum was unnecessary to the decision of the case and is not referred to by James L.J., who was the other member of the Court who gave judgment. The dictum is stated by Sir George Jessel M.R. in terms too broad and general to be of any service. Nor is that vagueness and indefiniteness cured by considering how it was applied in the particular case, because it could have no application to the facts of that case. There are, however, earlier decisions, which have been cited to your Lordships, in which an equitable principle is laid down for giving relief against the strict construction of a deed at law. That there is some such principle in equity I do not doubt, however reluctant as a common lawyer I may be to weaken the legal effect of the solemn undertaking involved in a conveyance or covenant under seal. The principle, however, is necessarily of limited application as the cases show. What its precise limits are I do not seek to fix. A doctrine of this kind must always be somewhat elastic to fit the special equities of the particular case. But I am clear that however understood it cannot affect this appeal. Certain things seem clear. The word " faith " is not perhaps very happy. In some of the cases the word " assumption " or " understanding " has been used in this context. " Faith " is clearly not used in a

(1) 11 Ch. D. 121, 125.

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theological sense. Nor can it mean a mere intention or expectation in the settlor's mind. It need not necessarily be proved by extrinsic evidence such as a prior agreement, but may be inferred from the nature of the transaction as known to both parties. The expectation or intention so inferred must be such that its failure, for instance by reason of the absence of execution by the other party or parties, makes the transaction substantially different from what it would have been if the parties had executed. Thus in *Evans* v. *Bremridge* (1) the Lords Justices, affirming the decision of Page Wood V.-C. (2), held that the intention of the transaction was that two joint and several co-sureties should execute, whereas only one did. They held that the lender could not enforce the deed according to its legal effect as against the one who executed. In Turner L.J.'s words it was not a matter of indifference to him that the intended co-surety did not execute. If the covenant had been enforced against him he would have been charged on a contract into which he did not enter. By way of contrast the equitable relief was refused in *Cooper* v. *Evans* (3) to joint and several sureties who claimed that they had executed the deed on the faith of its being executed by the principal debtor. But this failure to execute did not change the substance of the transaction. The sureties could not, it was true, directly treat him as a specialty debtor on that deed, but they could treat him as a specialty debtor indirectly by being subrogated on payment to the creditor's rights against him and these rights were by specialty. I need not refer in detail to other authorities, such as *Bolitho* v. *Hillyar* (4) or *Peto* v. *Peto* (5), which were cases of family arrangements, but which proceeded on the same principle that the absence of the parties who did not execute changed the substance of the transaction. The same test was applied in *Carew's* case (No. 2) (6), a case in which the director and subscribers of a company were concerned. These cases all deal with non-execution by a person named in the deed as being intended to execute it, where his failure to execute materially affected the substance of the transaction.

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(1) 8 De G. M. & G. 100.
(2) 2 K. & J. 174.
(3) L. R. 4 Eq. 45.
(4) 34 Beav. 180.
(5) 16 Sim. 590.
(6) 7 De G. M. & G. 43.

Now it seems to me impossible to apply any such principle to the present case where the substance of the transaction is not changed by reason of the fact that the first appellant did not execute the deed. It is true that she was not a party to the deed nor did she grant a release under seal as she did not execute it. But she could not enforce the deed or accept its benefits without binding herself to accept any reciprocal burden which its terms imposed on her. It is true that if she did not execute she was only bound as a promisor, not as a covenantor. But that in my opinion did not go to change the substance of the transaction. By the mere fact of her accepting, as I think she did, the benefits under the deed, she promised and agreed to release the former deed of covenant in accordance with clauses 16 and 17 of the deed. The substance of the matter is the transfer of the beneficial interest. This is not subject in terms to her executing the deed and her failure to execute did not in my opinion raise any equity. If the settlor wanted her execution as a condition precedent to the declaration of trust he should have inserted an express condition to that effect. Furthermore, in the event of her non-execution he could in a proper case have claimed an order against her to execute. But in my opinion her failure to execute was both in fact and in law a matter of indifference to him. There is no ground for saying that he executed the deed on the faith or assumption that the first appellant would execute. That idea was an afterthought. The same conclusion might be reached from a different line of argument. In the cases I have referred to the person who did not execute was neither plaintiff nor defendant. He was contemplated as a necessary party, but because he did not execute, never became a party to the instrument. The party who claimed the equity did so on the ground that he was subject to a greater burden because the other person, e.g., his intended co-surety, did not execute. In the present case the first appellant, by claiming to enforce the settlement, puts herself in the same position for all practical purposes as if she had executed, and the settlor was not prejudiced in fact because the release became effective when the first appellant accepted the benefits under the deed.

For these reasons, I find myself with all deference unable to see eye to eye with the Master of the Rolls. I have not thought it necessary to pursue various subsidiary difficulties which, it seems to me, would arise on his view.

In the result the settlement is and has been effective in favour of both appellants as your Lordships have already decided.

LORD ROMER. My Lords, I have had the privilege of reading beforehand the opinion of my noble and learned friend Lord Russell of Killowen. I agree with it so entirely that I only venture to add a few words of my own out of respect for the Court of Appeal with whose decision I have felt myself constrained to disagree. The conclusion arrived at by the members of that Court was an unanimous one; but they reached it by different paths. The Master of the Rolls, agreeing so far with Morton J., was of opinion that the deed executed by the settlor in the month of August, 1925, was sufficient in the circumstances to create an immediate and complete trust, notwithstanding the fact that it was not then executed by the female appellant. But he thought that her subsequent failure to execute the document entitled the settlor to treat the settlement as no longer effective upon the principle enunciated by Sir George Jessel in *Luke* v. *South Kensington Hotel Co.* (1) He was also of opinion that the female appellant had disclaimed and so put an end to the trusts thereby declared in favour of both appellants. Scott and Clauson L.JJ. on the other hand regarded the deed as being in effect no more than an offer made by the settlor to the lady to make a settlement upon her and the infant appellant in the terms which are contained in it. The learned Lords Justices, referring to the deed, said this: "The crucial "question is whether clause 1 is intended to, or indeed can, "on its true construction operate as though it were an unilateral "declaration of trusts by the settlor. In our judgment it

(1) 11 Ch. D. 121, 125.

"does not bear such a construction. Taken in conjunction "with the recitals and the testatum and the remaining clauses "of the deed, and in particular clauses 16 and 17, clause 1 "operates in our view to create a trust by the consensus "of the settlor . . . . and the female defendant, her consensus in the creation of the trust, and the contemporaneous "release of the pre-existing trust, being requisite in order "to perfect the transaction, which appears on the face of the "document to be the creation of a trust by way of supersession "of a previous trust, such previous trust to be brought to "an end by the concurrence of the female defendant in "the deed."

It is, I think, plain that in forming this view of the deed in question the Lords Justices must have regarded the settlement which it purported to effect as not being such a settlement as was contemplated by clauses 4 and 5 of the deed of covenant of February 1, 1923, and therefore as being one which would not operate as a satisfaction of the settlor's covenants without the " consensus " of the female appellant. In this, I think, with all deference, that they were wrong. It is true that the deed of August, 1925, did not secure to the lady an annuity during her life; for the annuity determined upon alienation. But so did the weekly sum payable under the deed of covenant. The trust for payment to her of the annuity under the deed of August did not therefore contain anything repugnant to the preceding " text " referred to in clause 5 of the deed of covenant. In my opinion a settlement in the terms of the deed of August, 1925, was one that would bring about a " supersession of the previous trust " without any consent or concurrence on the part of the lady. The settlement effected by that deed was in my judgment intended by the settlor to be, and was in fact, an unilateral declaration of trust by him. I cannot otherwise understand why clauses 4 and 5 of the deed of covenant were recited. The recital of them would have been altogether out of place in a settlement intended to operate as an agreement between the parties.

But the female appellant was made a party to the deed of settlement, and was so made for the purpose of expressly releasing the settlor from liability under the deed of covenant in consideration of the settlement that he was making. What effect then did her failure to execute the deed have upon the settlor's declaration of trust? In my opinion it had none. The general rule at common law as to non-execution of a deed by one of the parties is quite clear. In Sheppard's Touchstone it is stated as follows: "If there be divers "grantors, obligors, etc., named in a deed, and one of them "only do seal the deed, this is a good deed as against him that "doth seal, and void as to all the rest that do not seal." In *Morgan* v. *Pike* (1) it was accordingly held that a covenantee who was a party to an indenture might sue the covenantor who executed it, although he himself had not executed it, and notwithstanding the fact that there were cross covenants on the part of the covenantee which formed part of the consideration for the covenants on the part of the covenantor.

In equity, however, an exception has been engrafted upon the common law rule, and one of the questions to be decided upon this appeal is whether the present case falls within that exception. The Master of the Rolls, as I have already stated, held that it does, treating the exception, as perhaps he was bound to treat it, as having been correctly enunciated by Sir George Jessel in *Luke* v. *South Kensington Hotel Co.* (2) What Sir George Jessel said was this: "It is well settled "that if two persons execute a deed on the faith that a third "will do so, and that is known to the other parties to the "deed, the deed does not bind in equity if the third refuses "to execute." My Lords, with all respect to that great judge, this statement of the equitable principle is expressed far too widely. He does not mention the authorities by which the principle as enunciated by him had been well settled, and for myself I know of none. The authorities most in point are *Underhill* v. *Horwood* (3), *Evans* v. *Bremridge* (4), and *Carew's* case (No. 2) (5), none of which appears to have been cited to

(1) 14 C. B. 473.
(2) 11 Ch. D. 121, 125.
(3) 10 Ves. 209, 225.
(4) 2 K. & J. 174; 8 De G. M. & G. 100.
(5) 7 De G. M. & G. 43.

Sir George Jessel. The equitable principle that they lay down is that where, owing to the non-execution of a deed by one of the parties, the others who have executed it would by the application of the common law rule be bound by a covenant or transaction different in kind from that which it was their intention to enter into, they can be relieved in equity from the results of their execution of the deed. The cases that most commonly call the principle in aid are those in which a covenantor executes a deed with the intention of binding himself jointly with another party to the deed but owing to the non-execution of the deed by that other party finds that he alone is bound at common law. Equity will, where such intention is sufficiently shown, relieve the covenantor from his liability. But the principle is not confined to such cases. In the very case with which Sir George Jessel was dealing a deed had been prepared by which three trustee mortgagees purported to release the mortgagor and the mortgaged property from the mortgage debt. Two of the trustees executed the deed. The third trustee refused to do so. It was, however, argued that the effect of the deed was to release the debt at law, and it was this argument that was refuted by Sir George Jessel in the passage cited. He held that the deed did not bind the two trustees who had executed it. They would otherwise have been held bound by a transaction into which they never intended to enter. The only transaction that they intended was plainly one under which all three trustees concurred in releasing the mortgage debt. The case fell directly within the limited equitable principle established by the earlier authorities to which I have referred. It was not, therefore, necessary to extend the principle for the purpose of the decision, and it is plain that Sir George Jessel in no way intended to do so. His judgment, like all other judgments, must be construed in reference to the question that had to be decided, and so construed it should not, in my opinion, be regarded as an authority governing the case that was before your Lordships' House.

Upon the question whether the female appellant disclaimed the trusts in favour of herself and the second appellant, I cannot usefully add anything to what has fallen from my noble and learned friend Lord Russell of Killowen.

It was for these reasons, in addition to those given by my noble and learned friend, that I concurred in the motion for the restoration of the order made by Morton J.

Appeal allowed.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondents: *Murray, Hutchins & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* LISSENDEN . . . . APPELLANT.

AND

1939 Dec. 6, 7. C. A. V. BOSCH, LIMITED . . . . . RESPONDENTS.

1940 Feb. 8.

Workmen's compensation—Award in favour of workman and acceptance of compensation by him—Competency of appeal against amount of award—Approbation and reprobation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *Sch. I.* (4.).

The mere fact that a workman who has obtained an award of compensation under the Workmen's Compensation Act has accepted weekly sums payable thereunder does not preclude an appeal by him on the ground that the compensation should have been of a larger sum than that awarded.

Johnson v. *Newton Fire Extinguisher Co., Ld.* [1913] 2 K. B. 111 overruled.

The expression "approbate and reprobate" discussed and its scope explained by Viscount Maugham.

APPEAL from a decision of the Court of Appeal.

The appellant, Lissenden, obtained an award under the Workmen's Compensation Act, 1925, against the respondents and was paid 66*l.* 3*s.*, being compensation at the rate of 12*s.* 3*d.* per week as for partial incapacity from October 5, 1936, till October 31, 1938. From this award the appellant appealed, claiming that he was entitled to be paid the weekly sum of 12*s.* 3*d.* after October 31, 1938, so long as he was incapacitated. On coming before the Court of Appeal a preliminary objection was taken to the hearing based on the contention that the appellant could not be heard to prosecute the appeal as he had accepted the compensation and the costs awarded and had thereby approbated the award, and this objection was upheld by the Court of Appeal, who felt bound so to hold by the decision in *Johnson* v. *Newton Fire Extinguisher Co.* (1) The workman appealed to this House.

D. N. Pritt K.C., *Donald MacIntyre* and *P. H. Thorold*

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(1) [1913] 2 K. B. 111.

* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

Rogers for the appellant. The rule to which the Court of Appeal gave effect has been followed in a large number of cases since the decision in *Johnson* v. *Newton Fire Extinguisher Co.* (1), but that case was wrongly decided and should not be followed. In *Malcolm* v. *Barber, Walker & Co.* (2), a widow who had received compensation was held not to have approbated the award so far as her children were concerned, and she was held entitled to appeal in respect of their rights. In *Moore* v. *Cunard Steamship Co.* (3), Lord Blanesburgh pointed out that the fact that the employers had allowed an award of compensation to go in a final form and did not ask for an adjournment on the terms of their paying the agreed weekly sum to the respondent pending an appeal, did not in his view deprive the respondent of what was the statutory right of appeal to this House from the Court of Appeal order. "It constantly happens," he said, "that orders appealed "against to this House and here set aside have been acted "upon in the meantime."

[LORD WRIGHT referred to *Ker* v. *Wauchope* (4) where Lord Eldon L.C. said that "it is equally settled in the law of "Scotland, as of England, that no person can accept and reject "the same instrument."]

While that principle is well established with regard to wills and deeds, it has, we submit, no application to deprive a person of his statutory right of appeal. In *Ex parte Adamson* (5) it was held that where a partnership debt had been incurred by means of a fraud on the part of the partners, the defrauded creditor had a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, and did not lose that right merely because he had proved and received a dividend. In *Dexters, Ld.* v. *Hill Crest Oil Co.* (6) the Court of Appeal decided that a person who had demanded and accepted payment under an award was precluded from contending that it was wrong, but that case is distinguishable in principle from the

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(1) [1913] 2 K. B. 111.
(2) (1927) 20 B. W. C. C. 516.
(3) (1935) 28 B. W. C. C. 162.
(4) (1819) 1 Bligh, 1, 21.
(5) (1878) 8 Ch. D. 807.
(6) [1926] 1 K. B. 348.

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present case, where there is a statutory right of appeal. In *Evans* v. *Bartlam* (1) it was held by this House that a judgment debtor who asks for and obtains a stay of execution does not thereby approbate the judgment or elect to treat it as binding so as to preclude him from seeking to set it aside whether by appeal or otherwise. *Johnson* v. *Newton Fire Extinguisher Co., Ld.* (2) was wrongly decided and should not be followed.

F. A. Sellers K.C., and *Martin Jukes* for the respondents. The doctrine that a person cannot both approbate and reprobate has long been recognized both in England and in Scotland, and is founded on good sense ; indeed, it is axiomatic, and was affirmed by this House in *Pitman* v. *Crum Ewing* (3), it being there held that no person can accept and reject the same instrument. The principle was also accepted by this House in *Evans* v. *Bartlam* (1) and *Moore* v. *Cunard Steamship Co.* (4) ; see also *Tinkler* v. *Hilder* (5) and *Codrington* v. *Lindsay*. (6) Benefit cannot be taken under an award and the person taking it allowed to say in the same breath that it is wrong. In *Moore* v. *Cunard Steamship Co.* (4) Lord Blanesburgh, we say, recognized the principle for which we contend, but said that in that case it could not be applied.

This House took time for consideration.

1940. Feb. 8. VISCOUNT MAUGHAM (read by LORD ROMER). My Lords, this is an appeal from the Court of Appeal affirming an award under the Workmen's Compensation Act by His Honour Judge Drucquer made at the Brentford County Court. By the award it was ordered that an award be entered for the appellant against the respondents for the sum of 66*l*. 3*s*., being compensation at the rate of 12*s*. 3*d*. per week as for partial incapacity from October 5, 1936, until October 31, 1938, with costs.

The appellant appealed to the Court of Appeal against the said award asking that the said award be set aside or varied so that the said weekly sum of 12*s*. 3*d*., being compensation as for partial incapacity, should continue after the said October 31, 1938, so long as the appellant should be incapacitated or, in the alternative, that a new trial be had between the parties.

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(1) [1937] A. C. 473.
(2) [1913] 2 K. B. 111.
(3) [1911] A. C. 217.
(4) 28 B. W. C. C. 162.
(5) (1849) 4 Ex. 187.
(6) (1873) L. R. 8 Ch. 578.

The appeal came before the Court of Appeal, consisting of Slesser, Clauson and Goddard, L.JJ., on December 7, 1938, and, upon the hearing of the appeal, a preliminary objection was taken by counsel for the present respondents based on the contention that the appellant could not be heard to prosecute the said appeal as he had accepted the compensation and the costs awarded by the terms of the award, and had thereby approbated the award.

The grounds on which it was contended that the appellant had approbated the award are these :—

On November 14, 1938, the respondents' solicitors sent to the appellant's solicitors a cheque for 66*l.* 3*s.*, being the amount of compensation payable under the award. On November 17, 1938, the respondents' solicitors sent to the appellant's solicitors a cheque for the amount of the appellant's costs in the arbitration as taxed. On November 21, 1938, the respondents' solicitors received, with a letter dated November 19, 1938, from the appellant's solicitors, a receipt signed by the appellant for the said sum of 66*l.* 3*s.* compensation. On November 23, 1938, the respondents' solicitors received an acknowledgment of the sum of 26*l.* 8*s.* 8*d.* paid in respect of the costs of the said arbitration.

These facts are not in dispute. The notice of appeal to the Court of Appeal bore the same date as the date last mentioned, namely, November 23, and it was limited as above stated, that is, it did not seek to alter or disturb the award of compensation up to October 31, 1938, but sought to have the period of compensation for partial incapacity extended, or alternatively to have a new trial.

The preliminary point is in effect a plea as to jurisdiction. The Court of Appeal held themselves bound by certain previous decisions of the Court to allow the plea and to dismiss the appeal with the result that the award stands. The leading case is that of *Johnson* v. *Newton Fire Extinguisher Co.* (1)

(1) [1913] 2 K. B. 111.

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which has frequently been followed, till recently without comment or criticism. The Court consisted of Cozens-Hardy M.R., and Buckley and Hamilton L.JJ. The award was for weekly compensation, but it ordered certain instalments of costs to be deducted from these sums. The Court held that workmen, who had received certain sums under the award, could not appeal against any part of it. The ground stated had at least the merit of simplicity. The award, it was said, was indivisible: the appellant had accepted and acted upon it by a receipt of compensation: he could not accept part of it and claim to amend another part: that would be an attempt to approbate and reprobate the award—which could not be allowed.

My Lords, the question is whether this proposition is a sound one. I do not propose to mention all the reported cases in which it has been followed; but I may observe that it was doubted by Sargant L.J. in the case of *Malcolm* v. *Barber, Walker & Co.* (1), and that in the present case all three Lords Justices commented upon the injustice to which the proposition, by which they were bound, had led.

The rule has been held to apply irrespective of intention and of hardship. Thus in *Reeves* v. *S. Smith & Sons* (2) there was an award on the basis of partial incapacity on April 18, 1922. Pending the drawing up of the award the employers sent to the workman a cheque for five weeks' compensation in accordance with the award and said they would in the future send him a cheque every four weeks. He accepted the cheque, and shortly after a notice of appeal was served on the ground of the alleged insufficiency of the award. His solicitor then sent a cheque of his own for the amount of the cheque which had been received by the workman. It was held (by Lord Sterndale M.R., Scrutton and Younger L.JJ.) that on the decided cases it was clear that the acceptance of the cheque by the workman, even if it were returned, precluded the appeal. In *Jones* v. *Smith* (3), it was held by the Court of Appeal that receipt of a cheque in payment

(1) 20 B. W. C. C. 516.
(2) (1922) 15 B. W. C. C. 190.
(3) (1936) 29 B. W. C. C. 75.

of costs awarded was an approbation and precluded an appeal. Greene L.J. held, moreover, following the principle laid down by the authorities, that merely to proceed to taxation of costs under the award was an act of approbation which precluded an appeal.

My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7th ed., vol. i., pp. 141–2; and he treats "the "Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English juris-"prudence." It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines. I will cite three cases. First, is the case of *Ker* v. *Wauchope* (1) where Lord Eldon explained the doctrine in these terms: "It is equally settled in the law of Scotland, "as of England, that no person can accept and reject the "same instrument. . . . . The Court will not permit him to "take that which cannot be his, but by virtue of the disposition "of the will; and at the same time to keep what by the same "will is given, or intended to be given, to another person." The next case is that of *Birmingham* v. *Kirwan* (2) where Lord Redesdale treats the two doctrines as the same. He said: "The general rule is that a person cannot accept and "reject the same instrument, and this is the foundation of the "law of election." The third case is that of *Codrington* v. *Codrington* (3). Lord Chelmsford observed (4): "It seemed "to be considered in argument that the rule of the Scotch law "that a person cannot approbate and reprobate under the same "instrument was not altogether the same as the English "doctrine of election, but Lord Redesdale in *Birmingham* v. "*Kirwan* (2) puts them exactly on the same footing." Lord Hatherley agreed and said he was himself about to cite the observations made by Lord Redesdale in *Birmingham* v.

(1) 1 Bligh, 1, 21.

(2) (1805) 2 Sch. & Lef. 444, 449.

(3) (1875) L. R. 7 H. L. 854.

(4) Ibid. 866.

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Kirwan (1) which had just been made by Lord Chelmsford. Lord Cairns L.C. (2) stated the matter thus: "By the well "settled doctrine which is termed in the Scotch law the "doctrine of 'approbate' and 'reprobate', and in our Courts "more commonly the doctrine of 'election,' where a deed or "will professes to make a general disposition of property for the "benefit of a person named in it, such person cannot accept "a benefit under the instrument without at the same time "conforming to all its provisions, and renouncing every right "inconsistent with them." In the light of these authorities it seems that the phrase "you may not approbate or reprobate," or the Latin "quod approbo non reprobo," as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth: *Lacy* v. *Anderson* (3); and see as regards the history of the doctrine the very learned note of Mr. Swanston to *Dillon* v. *Parker*. (4)

It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles that apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question.

I will not attempt to summarize all the rules which are applicable to election in equity; but it is desirable for my present purpose to state some general propositions which are not I believe in doubt. In the first place, the doctrine—till the case of *Johnson* v. *Newton Fire Extinguisher Co.* (5)

(1) 2 Sch. & Lef. 444, 449.

(2) L. R. 7 H. L. 861.

(3) (1581–2) Choyce Cases in Chancery, 155, 156.

(4) (1818) 1 Swans. 359.

(5) [1913] 2 K. B. 111.

—seems to have been confined in England as in Scotland to cases arising under wills, and deeds and other instruments inter vivos. In the second place the doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it. The intention it may be added is not presumed in the case of two clauses in the same will, and in such a case the doctrine does not apply; nor could the doctrine be applied in the case of a married woman where either of the properties between which she would prima facie have to elect was subject to a restraint on anticipation; for the imposition of the restraint showed an intention that the married woman should not be put to her election: *In re Vardon's Trusts.* (1) In the third place the doctrine proceeds upon the principle not of forfeiture but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election in other words, being an equitable doctrine, is a question of intention based on knowledge.

My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925. For the present purpose there is no difference between the two. Both are the result of judicial proceedings. The Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act. The powers of a county court judge in such a case are practically the same as in an ordinary action in the county court, though he remains an arbitrator and having made his award is functus officio. The position as to enforcing the award and as to appealing on points of law from it are in substance the same as those which obtain in the case of High Court judgments: see Workmen's Compensation Rules 82 and 86, and see as to appealing Order LVIII. r. 20, of the R. S. C.

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(1) (1885) 31 Ch. D. 275, 279.

Whether we are dealing with a judgment or an award by a county court judge under the Workmen's Compensation Act it is, I think, clear, first, that there is no one in a position of testator or donor, and secondly, that the tribunal cannot be supposed to be intentionally putting the successful litigant to his election between two rights, since his right of appeal is his by statute and rule, and does not depend on the bounty of the judge. Moreover, if the case of *Johnson* v. *Newton Fire Extinguisher Co., Ld.* (1), was rightly decided, the would-be appellant's right is forfeited and he is not allowed to make compensation; and further his alleged "approbation" would appear to have been an act done without the least intention of giving up his right of appeal. In truth a judgment or such an award as we are now considering in no way resembles a will, an instrument inter partes, or a deed poll. The tribunal is deciding rights and has no option but to adjudge or award to a litigant that to which he is entitled, and cannot be supposed to be imposing limits on the powers of the appellate tribunal.

My Lords, I feel bound to come to the conclusion that the decision of the Court of Appeal in *Johnson* v. *Newton Fire Extinguisher Co.* (1), and all the cases in which the courts have felt bound to follow that decision are erroneous; for I think the doctrine which the Court of Appeal invoked was quite inapplicable to the case they had to deal with. It is necessary to add that there may well be cases in which a litigant may lose his right of appeal by reason of his conduct after the judgment or award; but this result would not, in my view, depend on "approbating and reprobating," but on whether the intending appellant is by his conduct estopped from appealing, or has in equity or at law released his right of appeal. It must be remembered in this connection that an appeal from an award or a judgment does not operate as

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a stay of execution either as to damages or costs unless the court appealed from or the Court of Appeal so orders (Order LVIII., rr. 16 and 20 (*c*) and (*d*); Order LIX., rr. 14 and 16—now reproduced in Order LIX., r. 34, sub-r. 5, and r. 35 (*d*)), and it would therefore seem very difficult to contend that payment by the defendant of a sum for which the judgment has found him liable can prevent the plaintiff from proceeding with his appeal. If payment of that sum is demanded, execution would not in general be stayed pending the appeal unless evidence were given to show that the plaintiff would probably be unable to repay the amount levied by the execution if, as the result of the appeal, the sum turned out not to be due. If it were shown that the amount of the judgment recovered was no more than the respondent or his counsel had admitted to be due from him, there could be no possible ground for a stay of execution. Conditions are not infrequently imposed when a stay is granted, but I think the numerous cases reported in the books will be searched in vain for any suggestion that payment by a defendant of what has been found to be due from him operates without more to prevent the plaintiff from appealing for some further relief.

It may be true that an award under the Workmen's Compensation Act, 1925, is "indivisible" if not appealed from; but it is not an accurate statement of the position pending appeal. The Rules make it plain that an appellant may appeal from any part of the award and that his notice of motion must state whether the whole or part only of the award is complained of (see Order LVIII., r. 20 (*a*) and (*d*), and Order LXIX., r. 34, sub-r. 2). That was the course taken by the appellant in the present case. The award was sought to be varied only so far as regards payment of the weekly sum after October 31, 1938. On what ground of law or equity (apart from that suggested in the *Johnson* case (1)) the launching of an appeal so limited ought to make it wrong for the appellant to receive from the respondents the sum awarded up to October 31, and the costs, I am unable to understand; and counsel for the respondents were unable to enlighten us. It certainly cannot be suggested that the receipt of the sum tendered in any way injured the respondents. Neither estoppel nor release in the ordinary sense was suggested. Nothing was less served than the principles either of equity or of justice.

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My Lords, for these reasons I am of opinion that this appeal should be allowed with costs here and in the Court of Appeal so far as they are applicable to pauper appeals, and that the case should be remitted to the Court of Appeal to be heard and decided.

LORD ATKIN. My Lords, in this case the applicant admittedly has suffered from an industrial disease, dermatitis, and been incapacitated from August 16, 1936, either wholly or partially until October 8, 1938. During the short period of total incapacity from August 16 to October 5, 1936, he was paid full compensation by his employers, the respondents, by whom he was employed as an electro-plater. After that date the employers employed him in another job at lower wages. On August 10, 1938, he claimed compensation as for partial incapacity from October 5, 1936, onwards. The employers by their answer admitted liability to pay 11*s*. 3*d*. a week from October 5, 1936, to October 8, 1938, at which date they alleged their liability ceased. The learned judge awarded the applicant compensation at 12*s*. 3*d*. a week from October 5, 1936, to October 31, 1938, the date of his award, but found that the incapacity had ceased at that date. The sum so awarded was 66*l*. 3*s*., of which sum the employers had admitted they were liable to pay 58*l*. 18*s*. The judge further awarded to the applicant the costs of the application, which were taxed at 26*l*. 8*s*. 8*d*. These two sums the employers' solicitors paid to the applicant's solicitors by cheque on November 14 and 17, 1938, receiving in return a receipt signed by the applicant enclosed in a letter from the applicant's solicitors intimating their intention to appeal. On November 23, 1938, the applicant's solicitors gave notice of appeal, asking that the award should be set aside or varied so that the weekly sum should continue so long as the applicant was incapacitated, on the ground that the learned judge was wrong in law in holding that the applicant had recovered from the industrial disease on October 31, 1938. When the case came on in the Court of Appeal, objection was taken by the respondents that the applicant had lost his right of appeal by accepting payment of the 66*l.* 3*s.* compensation and the 26*l.* 8*s.* 8*d.* costs awarded by the county court judge. My Lords, I am shocked to say that the Court of Appeal felt constrained to accede to this contention being bound by a decision of *Johnson* v. *Newton Fire Extinguisher Co.* (1), and a series of cases which followed that case which undoubtedly laid down the law as contended for by the respondents. The Lords Justices, Slesser, Clauson and Goddard, pointed out the serious injustice which was done to workmen in such circumstances by such a rule, following in that respect similar remonstrances that had fallen in the more recent cases from other members of the Court of Appeal. That a workman who has been held to be entitled to some compensation withheld from him in the past should not be entitled to exercise his statutory right to appeal so as to ask for more without forgoing the receipt of the compensation admittedly and undoubtedly due until his appeal is heard would, I think, appear to most people a rule unjust and entirely opposed to the scheme of the Act. I have no hesitation in saying that the original decision and those that followed it are wrong and should be overruled. In *Johnson's* case (1) there had been no dispute as to the liability to pay compensation, but there was a dispute as to amount and the workman commenced arbitration proceedings. He claimed 15*s.* a week: and in the proceedings the employers gave notice submitting to an award of 12*s.* 8*d.* The learned judge held that this was enough: awarded 12*s.* 8*d.*: gave the applicant the costs up to the employers' submission and gave the employers the costs after that date: and ordered that there should be a set-off of costs: and that any balance due to the employers up to 5*l.* 5*s.* should be set off against the compensation payable. The applicant accepted and received the compensation of 12*s.* 8*d.* a week but appealed against the order as to costs. The grounds of the appeal

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were that the judge had no jurisdiction to order or, alternatively, was wrong in ordering the applicant to pay the employers' costs, and secondly, that the judge had no jurisdiction to order, or, alternatively, was wrong in ordering, the balance of costs to be set-off against the weekly payments of compensation. At the hearing of the appeal the applicant's counsel withdrew the grounds of appeal affecting the order on the applicant to pay costs and sought to confine the appeal to the question of set-off of costs against compensation. Nevertheless, the Court held that inasmuch as the workman had received the compensation awarded he could not further appeal. He was attempting " to approbate and reprobate " the judgment of the county court judge. The award was one and indivisible, and it was impossible to allow him to say that part of it was good and part of it was bad.

My Lords, I find it difficult to speak of this judgment with the respect which is due to the eminent lawyers who composed the Court. The underlying fallacy is that it appears to treat an " award " made under the Workmen's Compensation Act as identical for purposes of appeal with an award of an arbitrator under an ordinary arbitration. It in no way resembles such an award, and it in every way resembles an ordinary judgment. By s. 21 of the Act, disputes are to be settled by a judge of county courts in accordance with the first schedule of the Act. By cl. 4 of the first schedule the Arbitration Act, 1889, is not to apply, and the decision of the county court judge is to be final unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal. By r. 29 of the Workmen's Compensation Rules the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way: and by r. 30 the award of the judge shall be enforceable in the same manner as a judgment or order of the court. Rule 100 provides that the forms in the Appendix may be used where applicable. The rules of the Supreme Court dealing with appeals are to be found in Order LVIII., r. 20, which, after prescribing certain procedure, provides: "(*d*) subject to the foregoing provisions "the rules for the time being in force with respect to appeals "from the High Court to the Court of Appeal shall, so far as "practicable, apply to and govern appeals to which this rule "applies." One of the rules so applied is Order LVIII., r. 4, which (inter alia) provides: "The Court of Appeal shall have "power to draw inferences of fact and to give any judgment "and make any order which ought to have been made, and to "make such further or other order as the case may require. "The powers aforesaid may be exercised by the said court "notwithstanding that the notice of appeal may be that "part only of the decision may be reversed or varied." All those rules were, in substantially the same form, in force in 1913. They seem to me to establish that the award of the county court judge is, for practical purposes, the equivalent of a judgment and is no more one and indivisible than is a judgment. If the Court of Appeal can say that part is good and that part is bad why cannot an appellant ask them to say so: and, if he can, what difference can it make that he has accepted that which is good? The fact is that awards in these cases may and often do contain on the face of them adjudications on many matters, e.g., that the applicant suffered injury from accident arising out of and in the course of his employment, that he was totally incapacitated from a given day to another given day and that the compensation for that period should be so much, that the total incapacity ceased on the given day and from that day he was partially incapacitated until another day, or that it has not ceased, and that the proper compensation is so much. Nearly all these findings are findings of fact and in that case are not appealable; but any of these may involve questions of law and so are appealable. It would reduce the whole system to chaos if the principle were really acted upon that there was one entire award which must be assailed as a whole or not at all. If one were to scrutinize the forms it would be found that the form 24 dealing with application by dependants divides the award into nine heads in which one declares who are the dependants, another declares that a particular respondent is not a dependant, and another orders the appointed sum to be apportioned in named proportions. It would be quite impossible to apply the Act and the right to appeal if the order was not treated as divisible. It is unnecessary to emphasize the essential differences between an " award " made in these conditions and the award in an ordinary arbitration. In the latter there is no appeal, the only right is to set aside the award, e.g., for misconduct of the arbitrator, or error in law on the face of the award, or defects in not awarding in full or in awarding in excess of the submission. In these cases the whole award goes: there is no power in any court to affirm part and disaffirm part. In these circumstances it may be right to say that if a party takes a benefit under an award he cannot afterwards be heard to say that it was entirely invalid, for, if so, he would have had no right to the benefit he took. I do not propose to decide what the law is in such a case. It may be that even then the question is merely one of restitution. But I am quite clear that such a case has no kind of analogy to the present class of case. For these reasons I am of opinion that the foundation of the reasoning in *Johnson's* case (1), namely, that the award is an entire award had no existence and the decision and all the subsequent decisions decided upon it falls.

In support of the contention that a party cannot appeal from a judgment after he has taken any benefit under it, the respondents relied on two practice cases decided in 1845 and 1849 which, in view of the importance of this case, I propose to discuss. *King* v. *Simmonds* (2), was a case which went to the Exchequer Chamber on a writ of error. When the case first came before the Exchequer Chamber it was found that while the writ alleged error on a judgment in a plaint in an action on promises, the transcript of the record showed that the judgment complained of was in fact given on an issue in execution proceedings. The Court of Exchequer Chamber then suggested that application should be made by the plaintiffs (the defendants in error) to the Court of King's Bench from whom error was brought to amend the issue and

(1) [1913] 2 K. B. 111. (2) (1845) 7 Q. B. 289.

record. The application was made to Wightman J. who gave leave to amend and directed that the plaintiffs should pay the costs of the amendments. The defendant taxed his costs which were paid on January 16. On January 14, the defendant obtained a rule to show cause why the order giving leave to amend should not be rescinded. The ground was that the only power to amend under the statutes then applicable, 14 Edw. 3, c. 6, and 9 Hen. 5, c. 4, was for misprision of a clerk, which in this case was not suggested. It was obviously an objection to the jurisdiction and the Court held that having taken a benefit the defendants could not attack the order. I should suppose that the Court would be relieved to find a ground for not deciding the question whether the Court of Exchequer Chamber had directed an application to be made which there was no jurisdiction to hear.

In *Tinkler* v. *Hilder* (1), the plaintiff had brought an action for trespass against a county court bailiff for seizing goods on an execution issued under a county court judgment against one Clarke, her landlord. While the plaintiff's action was pending, the bailiff, as he was entitled to, served the plaintiff with an interpleader summons in the county court: meanwhile he allowed the plaintiff to obtain an interlocutory judgment for want of plea. When the interpleader summons was heard, the plaintiff objected that the interpleader summons was too late. The judge repelled this objection, and as the plaintiff had filed no particulars in the interpleader proceedings, gave judgment for the execution creditor. The defendant, the bailiff, took out a summons to stay proceedings in the plaintiff's action on account of the interpleader proceedings. This was dismissed by Patteson J. A writ of inquiry was then issued and the jury assessed the damages at 35*l.* The defendant then took out a summons before Parke B. to set aside the judgment and all proceedings thereon on the ground of the adjudication in the interpleader proceedings. Parke B. made the order on payment of the costs of the day and of the execution of the writ of inquiry. These costs were taxed and paid. The plaintiff obtained a rule nisi to rescind this order.

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(1) 4 Ex. 187.

It seems to be plain that the ground was that the statute 9 & 10 Vict. c. 95, s. 18, which gave the power to stay had no application to an action based on trespass to land. In other words the contention was that the order was made without jurisdiction. The Court thought that the fact that the plaintiff had received costs under the order precluded her from taking further objection and discharged the rule. The short ground was expressed by Baron Parke, arguendo at p. 190: "You "have received a benefit under the order, and cannot now say "it is valid for one purpose and invalid for another." In the course of the argument, counsel for the defendant cited *King* v. *Simmonds* (1), *Kennard* v. *Harris* (2) and *Pearce* v. *Chaplin.* (3) *Kennard* v. *Harris* (2) was the case of an award of an arbitrator. A rule to set it aside was discharged when it was shown that the plaintiff had accepted the costs of the reference and award. This case needs no comment. In *Pearce* v. *Chaplin* (3) a judgment had been signed in default of plea, and the defendant applied to set aside the judgment and execution on the ground of an irregularity, it being alleged that before the judgment was signed, the defendant's solicitor had duly served a summons for time. On the summons, Pollock C.B. made the order but made a condition that no action should be brought (presumably against the sheriff). The sheriff when served with the order had relinquished the defendant's goods. On a rule to show cause why the order as to no action should not be rescinded, the Court of King's Bench took the view that the Chief Baron had not purported to decide the question of irregularity, but had imposed the term, acting under his discretionary power; and that in those circumstances a party who had taken advantage of the conditional order could not be allowed to discharge the condition.

These four cases will be found cited in Chitty's Archbold, 12th ed., 1866, as matters of practice. They are not cited at all in the Annual Practice. In any case they form a very flimsy foundation for such a wide-reaching principle applicable

(1) 7 Q. B. 289.
(2) (1824) 2 B. & C. 801.
(3) (1846) 9 Q. B. 802.

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to all appeals as was asserted in this case: and if they did lead to that result should not be followed.

But I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of "approbation and reprobation." The noble Lord on the Woolsack has to my mind clearly shown the limitations of that doctrine as defined in the law of Scotland from which it comes. In this country I do not think it expresses any formal legal concept: I regard it as a descriptive phrase equivalent to "blowing hot and cold." I find great difficulty in placing such phrases in any legal category: though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.

The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights: it is the same right that he claims but in larger degree. In *Mills* v. *Duckworth* (1), a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into Court and then had appealed against the quantum of damages and was met by a similar objection to his appeal. Lord Fairfield in overruling the objection pointedly said: "The plaintiff said 'I am not going to blow "'hot and cold. I am going to blow hotter'." Here the applicant is not faced with a choice between alternative rights: he has exercised an undisputed right to compensation: and claims to have a right to more. You have not lost your right to a second helping because you have taken the first.

It may be the case that the receipt of a remedy under a judgment may be made in such circumstances as to preclude an appeal. I do not think it necessary to discuss in what

(1) [1938] 1 All E. R. 318, 321.

circumstances the statutory right of appeal may be lost. I only venture to say that when such cases have to be considered it may be found difficult to apply this doctrine of election to cases where the only right in existence is that determined by the judgment: and the only conflicting right is the statutory right to seek to set aside or amend that judgment: and that the true solution may be found in the words of Lord Blanesburgh in *Moore* v. *Cunard Steamship Co.* (1): "It "constantly happens that orders appealed against to this House "and here set aside have been acted upon in the meantime. "In such a case, by appropriate direction of this House, any "mischief so done is undone." In other words, it is possible that the only question is whether the party appealing has so conducted himself as to make restitution impossible or inequitable. However, I have formed and express no final opinion on the matter.

In the result it is established that the workman has the right of appeal which was reluctantly denied him by the Court of Appeal and the case must be remitted to that Court in order that the appeal may be heard. The appellant must have the costs of the hearing in the Court of Appeal and of the appeal to this House so far as they are applicable to pauper appeals.

LORD RUSSELL OF KILLOWEN. My Lords, we are differing from, and reversing, a decision of Slesser, Clauson and Goddard L.JJ. which, however, they reached with reluctance, and only under the compulsion of earlier authorities by which they were bound. These being the circumstances in which their judgments come before us for consideration, I do not think that comity requires me to make a detailed statement of the reasons which influence me in supporting a motion for the allowance of the appeal.

I have had an opportunity of reading and considering beforehand, the opinions of my noble and learned friends Viscount Maugham and Lord Atkin. They express fully and accurately my own views; and I shrink from adding

(1) 28 B. W. C. C. 162.

anything lest, in the process, I should have the misfortune to detract from their weight.

Lord Wright (read by Lord Russell of Killowen). My Lords, the question in this appeal is whether *Johnson* v. *Newton Fire Extinguisher Co.* (1) was rightly decided. There is no controversy that the facts of the present case bring it within the ruling of that decision, which has governed similar cases for more than a quarter of a century. I am bound to confess that, like the members of the Court of Appeal who in the order now under review followed that decision, I regard it as not merely erroneous in law but (to adopt the language of Clauson L.J.) as a shock to one's sense of justice. Here is a working man, who in order to seek relief has to come to this House as a pauper because he has been held to be barred from his statutory right of appeal not by anything in an Act of Parliament but by a judicial decision. The county court judge has awarded him a sum as compensation and costs. No one disputes his right to either. But he complains that the award is erroneous in that he has not been awarded enough compensation because his incapacity continued beyond the date fixed by the judge, and also in that he has not been given a declaration of liability. If the order appealed from stands he is barred from his appeal on these matters simply because he has accepted the amount of the award when it was sent spontaneously to him by the employers, as was also the amount of the taxed costs. He is admittedly entitled to both of these sums in any case. They stand entirely outside the further claims which he made in the arbitration and wishes to make in the appeal. What he was awarded and what he received consisted of arrears of compensation withheld but now conclusively found to be due and owing to him. He is a wage-earner with a wife and children. It would be cruel if he were held to be prevented from applying these belated payments to the pressing necessities of himself and his family, except at the cost of being deprived of the right of appeal given him by statute. It is said that he ought to have waited until the appeal was heard, which might not be for many months. If he does not wait, or if he accepts the proffered payment, his appeal, it is held, is barred, and that even though he does so in ignorance that he is sacrificing his right to appeal.

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(1) [1913] 2 K. B. 111.

Johnson's case (1) has bound subsequent Courts of Appeal ever since 1913. There is no Court that could overrule it except this House. For some reason no litigant has had the courage or the money to bring it before this House, and this unfortunate doctrine of law has remained in force because the remedial powers of this House are dependent on some private litigant at his own expense or initiative bringing up the question by way of appeal. Such is the English system. But notwithstanding that the decision has been followed so long and so often, and has no doubt become regarded in certain quarters as an established rule, this House has the duty to reconsider it when at last it is brought before it and to set it aside if it is seen to be contrary to justice and convenience. There are in this case none of the considerations which in some other appeals have made the House refuse to disturb an established rule.

The rule in *Johnson's* case (1) was thus stated in compendious and positive terms by Scrutton L.J. in *Reeves* v. *Smith & Sons* (2): "On the decided cases, it is clear that if "it is desired to appeal against an award there must be no "acceptance of money under it." The question at once arises on what principle a rule so apparently unfair and anomalous was based. *Johnson's* case (1) was the decision of a strong court. It is no disrespect to the eminent judges who decided it to observe that even a strong court may, like Homer, on occasion nod. On full consideration, I find it impossible to support the decision.

Johnson's case (1) presented no unusual features. The compensation awarded was not in issue; it was clear that the workman was entitled to an order for costs. But the judge for reasons which appeared to him to be good, ordered a set-off in respect of a certain part of the employer's costs.

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(1) [1913] 2 K. B. 111.

(2) 15 B. W. C. C. 190, 192.

The workman accepted payment of the undisputed compensation and the undisputed costs. But he served a notice of appeal limited to the order as to the set-off of costs. The employers took a preliminary objection, contending " that "the order dealt with compensation and costs as a whole, "and the applicant has accepted and acted upon it."

The procedure originally contemplated by the Workmen's Compensation Act was that claims should be settled by arbitration. But it was competent to bring the arbitration in the county court before the county court judge as arbitrator. To-day the great majority of such claims are thus dealt with in the county court. There are statutory rules governing the procedure there and in effect equating the procedure in such claims to those in an ordinary action. In particular the rules as to appeals are put on the same footing as ordinary appeals from county courts. (Schedule 1 (4.) of the Act and rules made under it.) Thus the rules of the Supreme Court as to appeals from county courts apply. Of these rules I need now refer only to part of one rule, namely, Order LVIII., r. 4, which enables a notice of appeal to ask that part only of the decision appealed from should be reversed or varied. Thus the precise effect of the rules is to treat the order as appealable in part, and thus to recognize that it need not be regarded as a single indivisible whole. To apply this to *Johnson's* case (1), it follows from the precise terms of the rule that the part of the order as to costs was capable of being regarded as a separate and distinct part of the judgment, for purposes of being separately appealed against. Equally in the present case that part of the judgment which refused compensation beyond a certain date and that part which in effect though sub silentio refused a declaration of liability, constitute severable and distinct parts of the judgment, as to which Order LVIII., r. 4, enables an appeal that these parts of the judgment should be reversed or varied.

In so far therefore as *Johnson's* case (1) and those which have followed it, including the order appealed from, proceeded on the basis that the award was one entire indivisible award it was in flat contradiction of the statutory rules regulating the right of appeal. I do not know if the fact that judgments of county court judges in Workmen's Compensation cases are called awards, has led to some confusion. In arbitration in the ordinary sense the award is the fruit of a consensual agreement under which the parties have agreed to accept the arbitrator's award, which thus governs them by their agreement. There is no appeal in the proper sense of the term. The court has certain powers over arbitrators, which the parties may invoke. Thus a party may claim that the award was made without jurisdiction or that the arbitrator was guilty of misconduct and that for these or other like reasons should be set aside. A party who has treated the award as valid, for instance, by accepting payment of what it awarded him, would generally be barred from adopting the inconsistent attitude of claiming to set it aside. It might then be said that he could not affirm and disaffirm, or perhaps even that he could not approbate and reprobate. But I think it is clear that the position in a case like the present of an award by the county court judge, which is put on the same footing as an ordinary judgment of the court, is an entirely different matter. I cannot see how questions of election or of approbating or reprobating come into the matter at all in any ordinary case of this class. The workman, when he decides to appeal, exercises a choice between appealing and not appealing, and when he decides to appeal, exercises a choice whether he will appeal against the whole or against any part of the award. In the latter event, as in the former, he is exercising a legal right, just as in the case of an appeal in an ordinary action. The part of the order from which he does not appeal, especially if it is not attacked but accepted by the opposite party, gives him a present vested right, independently of the separate matters on which he desires to appeal and independently of the question whether he appeals or not. I do not see why he should not be entitled to receive or even enforce payment of what the court has awarded him and how that can affect his right to appeal on other independent parts of the judgment. It is true that even where there is no cross appeal, the Court of Appeal may in some cases modify or reform a judgment which is brought before it on appeal. If that affects payments already made, the Court might in a proper case order compensation. However, questions of that type cannot arise, or at least are not likely to arise, in cases like the present.

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(1) [1913] 2 K. B. 111.

But in *Johnson's* case (1), the Court of Appeal, having held that the award was one entire award, proceeded to decide the appeal by applying the principle, rule, or maxim, that one cannot both approbate and reprobate. I am induced here to quote the language of Lord Esher M.R. in *Yarmouth* v. *France* (2): "I detest the attempt to fetter the law by "maxims. They are almost invariably misleading; they "are for the most part so large and general in their language "that they always include something which really is not "intended to be included in them." Indeed these general formulæ are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution. But it is not safe to act upon them unless and to the extent that they have received definition and limitation from judicial determination. How this has happened in respect of the doctrine of "approbate and reprobate" has been fully and clearly explained by my noble and learned friend Viscount Maugham. Indeed, the formula in its more precise and technical significance has become an equivalent derived from Scots Law of the equitable doctrine of election. The formula is also sometimes used to indicate the position where a person takes benefits under a deed and is held bound because of his conduct in so doing by conditions expressed in the deed, though he has not executed it. In such and similar cases the formula becomes, as it were, a label, and lawyers know when and where to apply it. A more doubtful but still not infrequent use of the formula is in cases of common law election, where there is a choice between alternative and inconsistent remedies, for instance, between charging a defendant in tort and charging him for money had and

(1) [1913] 2 K. B. 111. (2) (1887) 19 Q. B. D. 647, 653.

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received or between charging the principal or the agent. In these latter cases the alternatives are mutually exclusive. In the cases of equitable election, the conscience of the defendant is affected because, in the language of Lord Cairns L.C. quoted by Viscount Maugham from *Codrington* v. *Codrington* (1), it would be inequitable that he should "accept a "benefit under the instrument without at the same time "conforming to all its provisions, and renouncing every "right inconsistent with them." It is in my judgment impossible to apply any such idea to the present case. The appellant was doing nothing inequitable or inconsistent. In taking the moneys which the respondents sent him in satisfaction of the sums actually awarded, he was exercising a legal right to be paid what was admittedly due to him; in serving his notice of appeal he was exercising another and independent legal right, namely, to claim that the award should be reversed or varied in part, that is, because it did not give the further relief to which he claimed to be entitled. I cannot see how the maxim or formula in any judicially recognized meaning can apply to this case. There is no question here of alternative or mutually exclusive rights between which the appellant had to choose. Even if there were (which it is not) a case of election, there is, furthermore, no evidence of the essential elements of election, namely, the presence of knowledge of the position and intention to elect.

I agree with the reservations made by my noble and learned friend Lord Atkin on the question whether there may not be cases where a statutory right to appeal may be lost. Like him I prefer to leave such cases for consideration if and when they arise.

The appeal should in my opinion be allowed.

LORD ROMER. My Lords, I agree.

Appeal allowed.

Solicitors for appellant: *L. O. Glenister & Sons.*
Solicitors for respondents: *Carpenters.*

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(1) L. R. 7 H. L. 854, 861.

[HOUSE OF LORDS.]

PRATT . . . . APPELLANT; H. L. (E.)*

AND

COOK, SON AND COMPANY (ST. PAUL'S), LIMITED . . . . . . RESPONDENTS.

1939
Dec. 11, 12, 13;
1940
Feb. 8.

Master and servant—Packer employed by wholesale drapers—Deductions from wages for food—Part of wages paid otherwise than in current coin—Claim for recovery of amounts so deducted—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 23.

The appellant had been employed as a packer for upwards of fifteen years by the respondents, a firm of wholesale drapers. By the contract of service he was to be paid a wage of 53*s.* a week, plus the provision of dinners and teas prepared and served on the respondents' premises valued at 10*s.*, and during his service he was paid accordingly. Subsequently he brought an action under s. 4 of the Truck Act, 1831, against the respondents, alleging that the contract for payment of part of his weekly wage, and the payments made thereunder, otherwise than in cash, were illegal, null and void, under the Truck Acts, and claiming to recover so much of the wages earned by him as had not been paid to him in cash:—

Held (Lord Romer dissenting), that the contract contravened s. 1 of the Act and was not protected by s. 23, the latter section being confined to making it clear that an employer is not prevented from supplying or contracting to supply to a workman any of the matters specified therein (but not on account of wages), and, if he wished, making a deduction or stoppage in respect of that supply from the workman's wages, provided that the workman has signed a written agreement for such stoppage or deduction. Sect. 23 presupposes a wage payable wholly in cash, and authorizes the supply, or a contract for the supply, of other matters, and (if the workman has signed a written contract authorizing it) a deduction or stoppage from the wages in respect of what has been supplied. The matters to be supplied are to be supplied for some value other than the workman's labour, and not on account or as part of the wages of that labour.

Held, further, that the action was brought on a specialty, and the limitation period was twenty years.

Decision of Court of Appeal [1939] 1 K. B. 364 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Wrottesley J. (2)

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(1) [1939] 1 K. B. 364. (2) [1938] 2 K. B. 51.

* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

The appellant, the plaintiff in the action, had been for upwards of fifteen years employed by Cook, Son & Co., wholesale drapers, of St. Paul's Churchyard. The terms of his employment were that he should be paid 53*s*. weekly, plus dinner and tea. In the course of negotiating what his wages should be, he asked for and saw Mr. Pragnell, the general manager, at which interview Mr. Pragnell said to him : "We "are giving you 53*s*. a week, and you will agree your dinner "and tea are worth an additional 10*s*." To this the plaintiff assented and worked on those terms for that firm until March 8, 1920, when the defendant company took over the business of the firm. The plaintiff continued in the employment of the company as a packer, receiving always the wage which complied with the minimum rate of wages paid to packers in the employment of the company, less 10*s*., and received also his dinner and tea. For a short period before April, 1920, the wages he was paid, together with dinner and tea valued at 10*s*., amounted to 3*s*. over the minimum rate of wage applied to packers employed by the firm. On December 1, 1935, as a result of an agitation for which the appellant himself was partly responsible, a ballot was taken of those of the employees who were receiving dinner and tea, and the majority, having decided against the provision of dinner and tea, the defendants handed over part of their premises to the men concerned rent free to enable them to set up their own canteen, and from that date until March, 1936, the appellant received by way of wages an additional 10*s*. weekly. No suggestion was made at any time that the food supplied to the men was not well worth the 10*s*. From time to time the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, of which the appellant was a member, fixed by agreement with the Wholesale Textile Association, representing the masters, the scales of pay applicable to various grades of employees, and agreed on the conditions of employment. The plaintiff was one of the persons who assisted in bringing these terms into existence, his interest being, as he said, that these terms should be applied to the workers employed by the respondents, and, generally speaking, he approved of the terms so agreed between the Union and the Association, and, in particular, he stated in evidence that he had approved the condition which was called "living in." The terms of that condition, which remained in all the various agreed scales and conditions were these: "4. Living in—allowance for board 10*s.*; board and "lodging 20*s.*; 12*s.* 6*d.* for board and lodging when on "holidays, statutory holidays not included. Those living in "to live out if they so desire by giving one week's notice and "employers to give the same notice if they desire employees "to live out." This condition was in force from July 27, 1921, until some date in 1929, when the Union gave notice to determine the arrangements. Throughout the period covered by the claim made by the appellant these conditions and scales of pay were applied by the defendants, and the plaintiff regarded himself as being employed on the terms of these agreements.

On these facts the plaintiff alleged that he was a manual worker employed by the respondents, and that he was, from March 8, 1920, to December 1, 1935, remunerated for his services partly in current coin of the realm, and partly not in current coin, and that to the extent of 10*s.* weekly he was throughout the period paid by the provision of meals. He claimed therefore that the payment in meals was illegal, null and void, under ss.3 and 4 of the Truck Act, 1831, and that he was entitled under s. 2 to recover from the respondents so much of the wages which he earned as was not paid to him in current coin of the realm, namely, 10*s.* weekly, amounting to 397*l.* 10*s.*

The respondents said that the appellant was not a manual worker and so was not entitled to the protection of the Truck Acts. Further, they said that he was not remunerated partly by current coin and partly by meals, but that he was paid the amount of money which in fact he received, that the provision of meals was a thing which the firm chose to do voluntarily, that that was permissible under the Truck Acts, and they relied on s. 23 of the Truck Act, 1831, as making it lawful to supply their employees with victuals, dressed or prepared under the employers' roof. Further, they said that the terms agreed with the Union, of which the appellant was a member, formed, if that were needed, an agreement in writing, which would make the deductions lawful. The respondents further relied on the Statutes of Limitation, namely, the Act of 1623 (21 Jac. 1, c. 16), and the Civil Procedure Act, 1833, and the Truck Act, 1896, s. 5, and said that, if the appellant's claim was well founded he was only entitled to recover in respect of wages not paid in current coin over a period of six months before the issue of the writ, otherwise for a period of two years, or at most over a period of six years.

In answer to the respondents' contention that they were entitled to supply their employees with victuals under s. 23 of the Truck Act, 1831, the appellant said that what in effect was done was to stop his wages to the extent of 10*s.* weekly in respect of the victuals with which he was supplied, and that the respondents could only do this if they had first obtained an agreement or contract in writing signed by the appellant himself. Finally, as regards the period of limitation, the appellant said that it was twenty years inasmuch as his claim was for a debt on a specialty, namely, an Act of Parliament, the Truck Act, 1831.

Wrottesley J. gave judgment for the appellant holding that the appellant was a manual worker who had entered into or worked under a contract with the respondents, and was therefore within the protection of the Truck Acts; that the respondents had contravened s. 3 of the Truck Act, 1831, by supplying the appellant with meals as part of his remuneration, and were not protected by s. 23, as there was no agreement in writing authorizing any stoppage or deduction from wages for meals; that the appellant was entitled to recover from the respondents under s. 4, the agreed value of the meals so supplied as being so much of the appellant's wages as had not been actually paid to him in current coin; that the action was for debt on a specialty for work done and the period of limitation applicable under s. 3 of the Civil Procedure Act, 1833, was twenty years after the cause of action, and that the appellant was therefore entitled to recover the full amount which he claimed.

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The respondents appealed to the Court of Appeal where it was held by Slesser and Finlay L.JJ., Goddard L.J. dissenting, that the contract between the parties did not contravene s. 1 of the Truck Act, 1831, inasmuch as s. 23 of that Act provided that nothing in the Act should extend to prevent any employer from supplying or contracting to supply to any artificer any victuals dressed or prepared under the roof of such employer and there consumed by the artificer. The appeal of the respondents was accordingly allowed.

The plaintiff appealed to this House.

H. J. Wallington K.C. and *Melford Stevenson* for the appellant. The Truck Act, 1831, clearly contemplates that the wage payable to an artificer, which admittedly the appellant is, must be paid in current coin and not otherwise. Sect. 23 (1) which allows deductions in certain cases has no application to the present case. Moreover s. 23 can apply

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(1) Truck Act, 1831, s. 23: ". . . . Nothing herein contained "shall extend or be construed to "extend to prevent any employer "of any artificer, or agent of any "such employer, from supplying or "contracting to supply to any "such artificer any medicine or "medical attendance, or any fuel, "or any materials, tools or implements to be by such artificer "employed in his trade or occupation, if such artificers be employed in mining, or any hay, "corn, or other provender to be "consumed by any horse or other "beast of burden employed by any "such artificer in his trade and "occupation; nor from demising "to any artificer . . . . the "whole or any part of any tenement at any rent to be thereon "reserved; nor from supplying or "contracting to supply to any "such artificer any victuals "dressed or prepared under the "roof of any such employer, "and there consumed by such "artificer; nor from making or "contracting to make any stoppage or deduction from the "wages of any such artificer for "or in respect of such rent; or "for or in respect of any such "medicine or medical attendance; "or for or in respect of such fuel, "materials, tools, implements, "hay, corn, or provender, or of "any such victuals, dressed and "prepared under the roof of any "such employer; or for or in "respect of any money advanced "to such artificer for any such "purpose as aforesaid: Provided "always that such stoppage or "deduction shall not exceed the "real and true value of such fuel, "materials, tools, implements, "hay, corn, and provender, and "shall not be in any case made "from the wages of such artificer, "unless the agreement or contract "for such stoppage or deduction "shall be in writing and signed "by such artificer."

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only when there is a contract in writing to which the workman is a party, and there was no such contract in this case. The deductions were therefore clearly illegal and are now recoverable.

Sir William Jowitt K.C., G. O. Slade and *Victor Wolff* (for *Charles M. Cahn* on war service). The Truck Act being a penal statute must be construed strictly, and if it is susceptible of two constructions, one involving an offence and the other not, the latter construction must prevail. Sect. 23 qualifies the absolute nature of the obligation contained in s. 1, and is to be construed as relating to everything contained in the preceding sections. In effect s. 23 is a proviso to each of the foregoing sections. It is important to see what the precise terms of the contract by which the respondents engaged the appellant were; in effect they said: " We will engage you "at 63*s*. a week, but be it understood we will require you to "have your dinner and tea on the premises for which you will "pay 10*s*. a week." Such a contract, we submit, is perfectly good, being (*a*) a contract for money wages and (*b*) a separate contract for the supply of dinner and tea. The respondents consequently deducted nothing; they carried out exactly what was the perfectly legal bargain made with the appellant, which, therefore, cannot be set aside. If, however, it is to be held that the contract was an infringement of the Truck Act, the question arises what is the limitation period applicable? As to this we submit, on the assumption that there was an illegal deduction from the appellant's wages, the limitation is six months: see s. 5 of the Truck Act, 1896, an Act which is to be construed with the Truck Acts, 1831 and 1887. If six months is not the relevant period, we say that it is two years, the action being one to recover " a sum of money given to a "party aggrieved by a statute" within the meaning of s. 3 of the Civil Procedure Act, 1833: see *Thomson* v. *Lord Clanmorris*. (1) Alternatively, we say that if two years is not the prescribed period, it is six years under the statute of James—21 Jac. 1, c. 16. This is not, as was held by Wrottesley J. and the Court of Appeal, an action upon a specialty: see

(1) [1900] 1 Ch. 718.

Cork and Bandon Ry. Co. v. *Goode* (1), *Gutsell* v. *Reeve* (2) and *Kenyon* v. *Darwen Cotton Manufacturing Co., Ld.* (3)

H. J. Wallington K.C. in reply. The professed object of the Truck Act, 1831, being to ensure that the workman shall be paid his wages in current coin, it is exceedingly unlikely that the Legislature in s. 23 of that Act should have allowed any departure from the absolute prohibition against payment otherwise than in the way set out earlier in the Act. With regard to the period of limitation, we say that the debt being on a specialty the period is twenty years, as was the view of Wrottesley J. and the Court of Appeal.

The House took time for consideration.

1940. Feb. 8. LORD ATKIN. My Lords, this is an appeal from the Court of Appeal who, by a majority, Slesser and Finlay L.JJ., Goddard L.J. dissenting, set aside a judgment of Wrottesley J. in favour of the plaintiff and entered judgment for the defendants. The plaintiff's action was under s. 4 of the Truck Act, 1831, to recover from the defendants, his former employers, arrears of wages at the rate of 10s. a week not actually paid to him in current coin. It is plain from the facts found by the learned judge and is not now disputed that part of the plaintiff's remuneration as a packer in the employment of the defendant, consisted of the provision of dinner and tea at the value of 10s. a week. The plaintiff was an artificer within the meaning of the Truck Act, and therefore, in apparent violation of s. 1 of the Act, his wages were not "made "payable in current coin of the realm and not otherwise": and apparently, therefore, he had the right to recover so much of his wages earned as were not so paid to him. On the question of liability the only question is whether s. 23 of the Act operates as an exception to the general prohibition in s. 1. It is not necessary to dwell upon the evils which led to the passing of the Truck Act, 1831. The practice of paying wages in kind had been an abuse for centuries and a series of

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(1) (1853) 13 C. B. 826.

(2) [1936] 1 K. B. 272.

(3) [1936] 2 K. B. 193, 205.

Acts dating from 4 Edw. 4, had been passed prohibiting such payments in particular trades. By 1 & 2 Will. 4, c. 36, all the previous prohibitions contained in some eighteen statutes were repealed: and by 1 and 2 Will. 4, c. 37, passed on the same day, which is the Act in question, the whole question was dealt with, and the list of trades in which the practice was prohibited was extended. The previous Acts had contented themselves with a mere prohibition of paying wages otherwise than in current coin or in bank notes. The new Act provided numerous safeguards to avoid evasion to be found in ss. 2–6. The Act is entitled "An Act to prohibit the payment, in "certain trades, of wages in goods, or otherwise than in the "current coin of the realm." It begins: "Whereas it is "necessary to prohibit the payment, in certain trades, of "wages in goods, or otherwise than in the current coin of the "realm; be it therefore enacted . . . . that in all contracts "hereafter to be made for the hiring of any artificer in any "of the trades hereinafter enumerated, or for the performance "by any artificer of any labour in any of the said trades, the "wages of such artificer shall be made payable in the current "coin of this realm only, and not otherwise." Sect. 2 provides that in any contract of the specified employment no provision shall be made directly or indirectly respecting the place where or the manner in which the whole or any part of the wages shall be expended. Sect. 3 makes effective the prohibition which in s. 1 was confined to contracts by providing that the entire amount of the wages earned by or payable to any artificer shall be actually paid to such artificer in the current coin of the realm. It thus would prohibit all deductions, but it goes on to say that every payment made to any such artificer of or in respect of wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be illegal. The reference to the exception appears to be to s. 8, which permits payment of wages to be in bank notes if the artificer consents. Sect. 4 gives the artificer the right to recover so much of the wages as have not been paid to him in current coin. Sect. 5 provides that in any action for wages the employer shall not be allowed

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a set-off or reduction in respect of any goods (*a*) received by the artificer as wages, (*b*) supplied to the workman at any shop of the employer. Sect. 6 provides that the employer may not maintain any action against any artificer in respect of any goods as mentioned in (*a*) and (*b*) in s. 5. Sect. 9 imposes a penalty upon any employer who makes a contract or any payment by the Act declared illegal. So far the Legislature seems to have devised a very thorough system of protection against the evils of truck, one of the chief of which was the habit of unconscionable employers of not only paying wages in goods, but of requiring wages to be expended in goods bought from the employer at prices which were much above the true value of the goods. It is said, however, that after constructing this elaborate fortification the Legislature by s. 23 provided what appear to be easy methods of undermining its foundations. Wages, it is said, could be paid in medicine and medical attendance, fuel, materials and tools for the trade of a miner, provender for the artificer's beast, rent, and victuals prepared or consumed on the employer's premises. It is true that the section provides for deductions to be made from wages in respect of such matters, and in respect of loans made to the artificer for such purposes: and it is clear that in respect of deductions the goods and services mentioned cannot have been supplied as wages, for if already supplied as wages, no deductions are necessary or possible. It has to be conceded that in respect of some of the goods a deduction can only be made of the true value, and as to any deduction it cannot be made unless there is an agreement in writing signed by the artificer. Nevertheless the true construction is that you may pay and contract to pay wages in the goods and services mentioned without any agreement in writing and without any check on value, whereas you may only deduct the value of such goods and services from wages if there is an agreement in writing and in some cases adequate value. My Lords, I cannot accept this construction of the section. I think with respect that Goddard L.J. went too far in saying that the section applied only to deductions, though there appears to be some support for that view in some of the speeches in

Williams v. *North's Navigation Collieries Co., Ld.* (1) I agree, however, that the main purpose of the section was to authorize deductions from wages. For that purpose it was necessary to make clear that the goods or services in respect of which the deductions might be made might lawfully be supplied or agreed to be supplied. The terms of s. 6 and in particular the terms of s. 2 that no provision shall be made directly or indirectly as to the manner in which any part of the wages is to be expended are quite sufficient in my opinion to raise such doubts as would need to be allayed by the terms of the section " nothing herein contained shall extend "or be construed to extend to prevent," etc. When one considers that the expressed object of this Act was to prevent the payment of wages in goods it would be very remarkable that an exception should be made without any reference at all to the supply of the goods and services specified being by way of wages: when there are added the provisions as to deductions and loans which are unmeaning unless the supply of goods and services to which they relate is something other than wages themselves I am forced to the conclusion that the section does not afford the easy passage through the early prohibitions, and that the supply of the goods and services specified in the section cannot be made by way of wages.

I should add that in any circumstances this case could not be regarded as one of deduction: but that the defendants must succeed, if at all, on their contention that the first part of the section authorized the payment of wages in kind.

On the remaining question of the period of limitation there has been no difference in the Courts below, and the decision seems manifestly right. There is a new cause of action created by s. 4 which goes only to a limited part of the remuneration. No such cause of action exists apart from the statute and it follows that the period of limitation must be as decided. The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of Wrottesley J. restored.

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(1) [1906] A. C. 136, 140, 142.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion which has just been delivered by my noble and learned friend, and I desire to express my concurrence in it; I only wish to add one or two observations.

In my opinion s. 23 is dealing with matters external to the hiring contract, which has been dealt with by ss. 1 and 2. But it is to be observed that s. 2 deals not only with the hiring contract, but also strikes at any other contract between the artificer and his employer which contains provisions which directly or indirectly offend against the section; one of the purposes of s. 23 is to make clear that the contracting to supply any of the matters specified in s. 23 is not to be affected, but s. 23 in no sense expresses permission to supersede the hiring contract so as to make it a contract of truck, or barter, for wages. On the other hand, s. 23 does expressly authorize the employer to make or contract to make a stoppage or deduction from the wages due under the hiring contract, in respect of the supply of the matters specified in the section—despite the provisions of s. 2—provided that he has the signed agreement of the artificer.

I agree with the motion proposed by my noble and learned friend.

LORD RUSSELL OF KILLOWEN. My Lords, that this is a difficult case is apparent from the difference of opinion prevailing both in the Courts below, and in your Lordships' House; but after careful and anxious consideration I concur with the view that the appeal should succeed. As I see it, the case turns wholly upon the true construction to be placed upon s. 23 of the Truck Act, 1831.

The respondents contend that (as regards the trades to which the Act applies) it specifically authorizes the payment of wages in goods or otherwise than in cash, to the extent and in manner therein mentioned and that accordingly (what is relevant to this case) it authorizes an employer to supply or to contract to supply to a workman as part of his wages, victuals dressed or prepared under the roof of the employer and there consumed by the workman.

On the other hand, the appellant contends that the section only authorizes the employer to supply or to contract to supply to a workman the matters specified in the section (including such victuals as aforesaid) as something outside his wages which must be wholly payable in cash, though the section permits a proper deduction from those wages in respect of the matters supplied, provided an agreement for such deduction shall be in writing and signed by the workman.

Those are the two rival views, between which we have to choose. For myself I feel at the outset pressed by the fact that the Act, by its title and preamble, declares that its object is to effect something which it says is necessary, namely, to prohibit the payment in certain trades of wages in goods, or otherwise than in current coin of the realm; and it being the avowed object of the Act to effect that necessary reform, it would in my opinion require words plain, and incapable of any other construction, to justify the view that by s. 23 the very evil which the Act says it is necessary to prohibit is permitted to continue even to a comparatively limited extent. But if, as I think it does, the section lies wide open to a different interpretation, I feel bound to give it that interpretation and preserve unimpaired the declared intention of the Act.

In my opinion the section is confined to making it clear that an employer is not prevented from supplying or contracting to supply to a workman any of the specified matters (but not on account of wages), and, if he wishes, making a deduction or stoppage in respect of that supply from the workman's wages, provided the workman has signed a written agreement for such stoppage or deduction. In other words it authorizes two kinds of transactions which might otherwise have been said to be forbidden by certain provisions of the Act, namely, (1.) the supply of goods by s. 2 (see the words "directly or "indirectly"), s. 5 (second part), and s. 6 (second part), and (2.) the stoppage or deduction by s. 3. The section presupposes a wage payable wholly in cash, and authorizes the supply or a contract for the supply of other matters and (if the workman has signed a written contract authorizing it) a deduction or stoppage from the wages in respect of what has been supplied. The power to stop or deduct necessarily refers to a stoppage or deduction in respect of the matters which the section permits to be supplied or contracted to be supplied, and, since wages cannot be deducted from wages, it must follow that the matters to be supplied are to be supplied for some value other than the workman's labour and not on account or as part of the wages for that labour.

It would indeed be strange if the Legislature had authorized a verbal contract for the payment of wages (it might be wholly) in kind, but insisted on a contract in writing before any deduction in respect of kind could be made from cash wages. For these reasons I think that the section does not operate to allow any portion of a workman's wages to be paid or payable otherwise than in cash.

Upon the question of limitation I agree with the view which is, I believe, shared by all before whom this case has been argued. The appellant is bringing an action which but for s. 4 of the Act he could not bring. The action is therefore brought on a specialty and the limitation period is twenty years.

I would allow the appeal and restore the judgment of Wrottesley J.

LORD WRIGHT (read by LORD RUSSELL OF KILLOWEN). My Lords, the facts of the case have already been fully stated and I need not repeat them. It is enough to say that in my opinion the weekly wages which the respondents contracted to pay to the appellant were (1.) 53*s.* in cash, and (2.) certain meals, dinner and tea, dressed and prepared under the roof of the employers and there consumed, said to be worth 10*s.* The meals were as much the man's wages as was the money payment. This follows from the definition contained in s. 25. The food was something which was had or contracted to be paid as a reward for his labour and was, equally with the money, to be deemed to be the wages of his labour. His wages were not 63*s.* subject to a deduction of 10*s.* a week which was the admitted fair value of the meals, but was 53*s.* and the meals.

Such being the contract, it falls precisely within the mischief aimed at in s. 1 of the Truck Act of 1831. The preamble to the section stated that it was necessary in certain trades to prohibit the payment of wages in goods or otherwise than in the current coin of the realm, and the section enacted that in all contracts hereinafter to be made for the hiring of any artificer in any of the enumerated trades and for the performance by the artificer of any labour in such trades, his wages should be made payable in the current coin of the realm and not otherwise. The section went on to declare "illegal, null and void" any such contract in which the whole or any part of such wages should be payable in any manner other than "in the current coin aforesaid."

The appellant is admittedly an artificer to whom the Act applies. It must, it seems, follow, unless there is some specific statutory exception to the contrary in the Act which takes this contract out of s. 1, that the contract was illegal, null and void. That being so the appellant must be entitled to say that he is not bound by the illegal and void contract, but has the right to claim to be paid a fair remuneration for his services, and after giving credit for any money payments which he has received on account of remuneration, to recover under s. 4 so much of the wages earned by him as was not actually paid to him by the respondents in the current coin of the realm. In effect if a fair wage was 63*s*. a week, the respondents must deduct for each week the amount of 53*s*. actually paid to him in cash or current coin, and then he is entitled under s. 4 of the Act to claim the balance of 10*s*. a week. This is his actual claim which so far as I understand it is only attempted to meet, apart from questions of limitation, by a contention that the plain effect of s. 1 is qualified by s. 23 with the result that in the circumstances of the case the contract is not illegal and invalid, but is good and enforceable.

Now, it is true, that a statute must be read as a whole and when its sections are read together, it may turn out that the apparent effect of one section, even a governing section such as s. 1 of the Act, may be cut down and qualified by a later section or sections. But with all respect to the members of the Court of Appeal, who have taken the view that s. 23 has this effect, I find it impossible so to construe this Act as to nullify the plain provision of s. 1 or to find anything which legalizes a contract of employment in which wages are payable otherwise than in current coin. The mere fact that s. 23 enables the employer to supply certain things to the man is not expressly inconsistent with s. 1 nor is it so inferentially. It says nothing as to how the things supplied are to be paid for. The part of s. 23 which deals with deductions from wages which is expressly an exception to s. 3, seems to me to presuppose that the wages are cash wages and nothing else. The Act was a remedial measure, following a long established policy of the English Legislature to protect workmen against the exactions of avaricious employers who sought to make an extra profit by compelling their men to take their wages in part in goods or in some cases to purchase necessaries at the employers' shops. The evils liable to result from this are too well known and too obvious to need to be stated here. It is no answer to a claim for breach of the positive prohibition of the Act that in the particular case the employer was generous and was helping his men, or that, as for instance in this case, the man would be getting an undue advantage by first accepting the wages in cash and kind, and then reopening the transaction by claiming a second payment in cash in respect of what he had already received, a reward in kind. Sect. 4 provides for that very state of things. Nor could the statute draw a distinction between good and bad employers. Its terms are, and must be, mandatory and absolute. Hence it is not right to say that the claim is unconscientious. The appellant is merely claiming what the law gives him. It is the respondents' own fault or misfortune, if, no doubt with the best intentions, they did not comply with the law. The plain effect of s. 1 can only be negatived or qualified by an equally plain exception, whether expressed or by necessary inference. As I hope to explain in detail, I find no such exception in the Act.

But the respondents' contention is that they did comply with the law. That depends on what is the true effect of s. 23.

As the statute is remedial and for the benefit of the workman, there is no reason to construe it strictly against him, though it does limit the employers' common law rights. On the contrary the statute should be, if required, that is, if it is ambiguous, construed in favour of the workman. But in the view which I take of the position, there is no occasion to dwell on this aspect. The Act is not to my mind ambiguous. It is enough to construe the Act according to its ordinary fair interpretation in order to decide this appeal.

Before further considering s. 23, I should refer shortly to some other sections of the Act. Sect. 2, like s. 1, deals with the provisions of the contract. A contract coming within the Act is to be illegal, null and void, if it contains provisions as to the place where and the manner in which the whole or part of the wages are to be expended. Sect. 3 deals not with the contract but with payment of the contracted wages, and requires such wages to be paid in the current coin of the realm, and enacts that any payment made by the employer to the man "of or in respect of any such wages" by the delivering to him of goods or otherwise than in current coin of the realm shall be illegal, null and void. But s. 3, unlike ss. 1 and 2, is qualified by the words "except as hereinafter mentioned." The qualification, as the sequel here will show, refers to ss. 8 and 23. Before considering the effect of these sections I should refer to ss. 5 and 6. Sect. 5 prohibits in any action brought by a man against his employers for his wages, any set off or claim to reduce the claim by reason of any goods received by the man "as or on account of his wages or in "reward for his labour" or for any goods supplied at a shop or warehouse kept by the employer or in the profits of which he is interested. Sect. 6 contains a prohibition against any action by an employer against the man in respect of goods supplied to the man "as or on account of his Wages or Reward "for his Labour" or supplied from a shop or warehouse kept by the employer or in which he is interested. These two sections are ancillary to the first four sections of the Act and are aimed at excluding any subterfuge by which the provisions of the first four sections might be evaded, as well as expressly

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dealing with the mischief of what used to be called "the "tommy shop," that is a shop in whole or in part, in name or in fact, owned or operated in the interest of the employer. It is to be noted that these sections deal with two different and distinguished matters. The former deals with goods, etc., supplied as on account of his wages, but does not prohibit the man doing what he likes with his cash wages, such as paying his employer for goods supplied, provided the workman does not get them from a shop or warehouse owned by the employer or in which he was interested.

But there is no prohibition so far aimed at preventing the employer from supplying goods or services to his men, so long as they are on cash or other ordinary terms and do not affect the wages or the payment of the wages or form part of the wages and are not supplied for or on account of wages, or at a "tommy" shop.

The prohibition in s. 8, which is one of the exceptions referred to in s. 3, is obviously inserted for reasons of convenience, which are not thought to be inconsistent with the policy of the Act. Bank notes, it enacts, are to be treated as currency and as equivalent to current coin just as they are commonly regarded in ordinary life. In fact they are now legal tender and have practically ousted gold as currency. The section deals not only with actual payments, but with contracts for payment, in bank notes; but only, however, if the "artificer shall be truly consenting to receive them."

Sect. 23 is the section on which the majority of the Court of Appeal proceeded, holding that it protected contracts offending against s. 1 as well as payments offending against s. 3. In the words of Slesser L.J., s. 23 provides that "nothing "in the Act shall render illegal a contract to give food of the "kind defined in section 23 in addition to money wages as "remuneration for his services." In his view also the section is "an omnibus provision sweeping up ss. 2 and 3 in the "permitted exceptions."

Sect. 23 may be analysed into two parts. The latter part deals with stoppages and deductions from wages in respect of the matters, goods, rent and so forth enumerated in the first part of the section. This part of s. 23 is not directly relevant in this appeal for two reasons. First there was no stoppage or deduction from a money wage which this part of the section is clearly postulating, on account of goods, etc., supplied. The food was part of the wage and could not be deducted from itself. Secondly, even if there had been a deduction from the cash wage of the fair value of the things supplied, there was no agreement or contract for such stoppage or deduction in writing or signed by the appellant which is the condition required by the section. This part of the section does pro tanto where it applies qualify s. 3, which deals with payment, and constitutes one of the exceptions referred to in s. 3. But the question raised is whether the first part of s. 23 constitutes, as the majority of the Court of Appeal held, an exception to s. 1. I cannot, with all respect, think that it does. In the first place s. 1 is unqualified in terms. Nor does s. 23 in terms refer to s. 1 or purport to qualify it. It is said that inferentially it does because otherwise it is superfluous. There is nothing, it is said, in the Act which forbids an employer to supply goods, etc., as an ordinary creditor, so long as he does not do so as or on account of wages. The section it is said must have been inserted with some definite object and that object must at least have been to give a special exception from s. 1 in respect of the specific categories of goods or other considerations enumerated in the section in respect of which, it may be, the Legislature thought that it would or might be beneficial to the man if he were able to get them from the employer as remuneration for his services. I do not regard this as a sound argument. In my opinion so drastic a qualification of the fundamental provisions of s. 1, if intended, would have been effected by clearly expressed exceptions and permissions, and not by the mere cautionary words such as "nothing shall extend or be construed to "prevent," etc. Such words are more apt to introduce matters inserted ex abundante cautelâ, and to resolve possible doubts by clearly stating what may be lawfully done or to lead up, by enumerating the relevant matters, to the express and definite modifications which the latter part of the section enacts. It is true that in the Act there is nothing to prevent an employer supplying goods or other benefits to a workman and charging for them, so long as ss. 1 and 3 are not infringed, that is so long as the contract wages are in current coin and so long as ss. 2, 5 and 6 are not infringed. The first part of s. 23 may have been inserted to exclude in the specific cases mentioned any question under these latter sections. But however that may be, the first part of s. 23 contains no reference to the wages contract, it does not in terms enable the employer to supply or contract to supply the enumerated things or benefits as for or on account of wages, it does not say that any part of the wages should be made payable in the form of or by means of such things, etc. To my mind it leaves s. 1 entirely on one side. The two sections can stand together, without any contrariety or overlapping. Sect. 23 (first part) is silent as to how the goods, etc., are to be paid for by the workman. The clear intention is, in my judgment, that the wage contract is to be for payment in current coin and payment is to be made accordingly in current coin, subject only to s. 8 and to s. 23 where it applies, that is, where a stoppage or deduction is permitted in the special cases and subject to the special conditions expressed in the section. Save in such cases and subject to these conditions, s. 3 is unaffected. Sect. 1 is not affected by s. 23 at all. In the facts of this case, the latter part of s. 23 obviously does not apply. That section can only be relevant if it be held that the former part qualifies s. 1 and validates what is ex facie a breach of its clear terms. As I do not think for the reasons which I have endeavoured to explain that it expressly or impliedly qualifies s. 1, I regard it as irrelevant in this appeal and I agree with Wrottesley J. and Goddard L.J. After more than a century this important question of construction has for the first time come before this House. The House must decide the question simply on a fair reading of the actual words of the Act. I further observe that the construction adopted by the majority of the Court of Appeal would, over a wide and important area, completely nullify s. 1, which is the governing section of the Act.

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Section 4 of the Truck Amendment Act, 1887, is different in expression and in policy and in any case could not help in determining the construction of the Act of 1831.

On the question of the proper period of limitation of the claim I agree with what I think has been the opinion of all the judges below, which is that the proper period is twenty years under s. 3 of the Civil Procedure Act, 1833, because the debt is a specialty debt due under a statute. The appellant's claim is brought on s. 4 of the Act of 1831 and on nothing else. As the contract offended against s. 1, it was illegal, null and void. There was thus no contract under which he could claim any remuneration. He must rely on s. 4, which contemplates that the man has earned wages, and enables him to receive so much of the wages as he has not been paid in current coin. What in such a case are the wages and how are they to be estimated? They cannot be estimated on the basis of any contract because there is none. The answer can only be that they are to be assessed on the basis of a fair and reasonable remuneration. In this case, that has been taken to be 63*s.* a week, not because the contract is reinstated in any sense because that is in law impossible, but because the facts afford good evidence that 63*s.* a week was a reasonable reward. That being so, from the wages earned, sums actually paid in cash must be deducted, and the balance of 10*s.* a week is recoverable by the appellant for the whole period of his claim.

I concur in the motion proposed.

LORD ROMER. My Lords, the question to be decided upon this appeal is one of some importance arising under the Truck Act of 1831. The question is this. Having regard to the provisions of s. 23 of that Act is it lawful for an employer to pay or contract to pay part of the wages of an artificer within the meaning of the Act by the supply of victuals dressed or prepared under the roof of such employer and there consumed by the artificer? The answer to the question depends upon the proper construction of the section, and in order to ascertain this some of the earlier provisions of the Act must be examined.

The first section of the Act is concerned with the contract of hiring made between the employer and the artificer. In every such contract the wages of the artificer must be made payable in the current coin of the realm and not otherwise. If in any such contract the whole or any part of such wages are made payable in any manner other than in the current coin of the realm, the section provides that the contract shall be and is thereby declared illegal, null and void. This section, however, would not of itself be sufficient to effect the object of the Act which, as expressed in its title, was "An Act to "prohibit the payment in certain trades of wages in goods or "otherwise than in the current coin of the realm." An unscrupulous employer might well contract to pay the wages of an artificer in such coin and nevertheless on the day of payment induce the artificer to accept goods in discharge of the contractual sum in whole or in part. It is accordingly provided by the second half of s. 3 that any payment of wages by delivery of goods or otherwise than in current coin shall be illegal. Another way in which such an employer could defeat, not the letter indeed but the spirit of the object as so expressed, would be by inducing his employee to purchase goods from him on credit and subsequently deducting the price of such goods from the man's wages. Any such deduction is forbidden by the first half of s. 3 which provides that the entire amount of the wages earned by or payable to the artificer shall be actually paid to him. The object of the Act might have been defeated in yet another way. An employer might by contract with the artificer impose upon the latter the obligation of laying out or expending the wages due or to become due to him, upon, or in the purchase of goods from a shop or warehouse kept by or belonging to the employer or in the profits of which the employer might have a share or interest. The wages in such a case would no doubt be wholly paid in coin of the realm but by virtue of such a contract they would in whole or in part find their way back into the pockets of the employer. It is therefore provided by s. 2 of the Act that a contract imposing such an obligation is " illegal, "null and void." Sects. 5 and 6 are also designed to prevent

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on the part of an employer evasions of the objects that the Act had in view, and though some of the provisions contained in them are not, perhaps, strictly necessary in view of the earlier sections, they do contain other provisions which complete the scheme of the Act by depriving the employer as between himself and the artificer of any right of action or set-off in respect of goods sold or supplied to the artificer at any shop or warehouse kept by or belonging to the employer or in the profits of which the employer has any share or interest.

The important thing to notice about the five sections to which I have referred is that each one is an integral and necessary part of the scheme for carrying into effect the expressed object of the Act.

I must now turn to s. 23. The terms of it are familiar to your Lordships and I need not read it at length. It is sufficient for the moment to call attention to the opening words " and "be it further enacted and declared that nothing herein "contained shall extend or be construed to extend to "prevent . . . ." Notwithstanding these words it is plain from what follows that the section is not inserted ob majorem cautelam but that it is really a section that introduces exceptions to the Act. In other words I agree with the author of the marginal note to the section who there describes it as constituting " Particular exceptions to the Generality of the " Law." The question that your Lordships are called upon to determine upon this appeal is what those exceptions are. In the Court of Appeal Goddard L.J. thought that the exceptions were of a very limited nature. " In my opinion," he said, " the section deals with authorized deductions and the "circumstances under which they may be made and with "nothing else." He considered therefore, in effect, that the section merely creates an exception to the first part of s. 3 which provides that the entire amount of the wages shall be actually paid in coin of the realm. I do not so read the section. If that had been its object, it would, I think, have necessarily been expressed in very different language. The section as drawn seems to make a clear distinction between the supply or the contract to supply certain things and the demising therein mentioned on the one hand and the stoppage or deduction from wages on the other. The stoppage or deduction is treated as a separate and distinct matter. The section provides that nothing in the Act is to prevent an employer from supplying or contracting to supply the things mentioned or demising as therein provided. That is one thing. It goes on as follows: " Nor from making or contracting to make "any stoppage or deduction . . . . " which means " and "nothing in this Act is to prevent an employer from making "or contracting to make any stoppage or deduction." That is another and a different thing. Slesser L.J. said that the section deals with two different subject-matters. Finlay L.J. said that the section falls into two distinct parts intended to have a separate and distinct operation. I respectfully agree with them. For those reasons the section so far as it is relevant to the present appeal may be read as follows: " And be it "further enacted and declared that nothing herein contained "shall extend or be construed to extend to prevent any "employer of any artificer from supplying or contracting to "supply to any such artificer any victuals dressed or prepared "under the roof of any such employer and there consumed by "such artificer." This taken by itself is sheer nonsense. Nothing in the rest of the Act is capable even by the most perverse construction of being treated as prohibiting an employer from supplying or contracting to supply his workmen with food wherever dressed or prepared or wherever it may be eaten. What the Act does prevent is the attaching by the employer of certain conditions to any such supply or contract to supply. He may not at the time of hiring attach a condition that the food shall be taken as part of the artificer's wages (s. 1). He may not stipulate that the artificer shall lay out his wages in buying the food from the employer whether on or off the employer's premises (s. 2). The employer may not pay the wages either in whole or in part by supplying him with the food (second part of s. 3). If the employer supplies the artificer on credit with the food from his own shop or from any shop in the profits of which the employer has a share or interest, he cannot recover the price by action or set it off in any action brought by the artificer for the recovery of his wages (ss. 5 and 6). If, therefore, the first part of s. 23 is to have any operation at all, and it is plain that some effect must be given to it if possible, this can only be done if it be treated as introducing an exception to one or more of the sections to which I have just been referring. This much is, indeed, conceded by the appellant if the section is not to be regarded as dealing solely with deductions from wages. He contends however that the only sections of the Act to which s. 23 is in that event to be regarded as introducing an exception is s. 2 and (presumably) ss. 5 and 6. He maintains that there are no exceptions to s. 1 or the second part of s. 3.

My Lords, with the greatest respect to those who think differently, I find it impossible to understand why, if the first part of s. 23 is to be treated as introducing an exception to ss. 2, 5 and 6, it is not to be treated as having the like effect on s. 1 and the second half of s. 3. It has been objected that so to treat it is inconsistent with the expressed object of the Act which, as I have already stated, is to prohibit payment in certain trades of wages in goods or otherwise than in the current coin of the realm. But in the first place I know of no rule of construction that would deny to a section of an Act an excepting effect because to do so would limit the expressed object of the Act. That is the function of an exception. The exceptions which I find contained in s. 23 are in any case very limited in their scope, and even if they extend to s. 1 and to the second half of s. 3, as I think they do, it is still quite accurate to describe the Act as one to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm. In the second place, each of the ss. 1, 2, 3, 5 and 6 is, as I have already pointed out, an essential and integral part of the scheme for effecting the object of the Act, and if it be inconsistent with the expressed object of the Act to treat the first part of s. 23 as introducing exceptions to the provisions of s. 1 and the second part of s. 3 it is also inconsistent with that object to treat s. 23 as introducing exceptions to s. 2 and the first part of s. 3. That the second part of s. 23 does introduce an exception to the first part of s. 3 which prohibits deductions from the wages is admitted by everybody. But a deduction from wages results in a part of them not only not being paid in the current coin of the realm, but in a part of them not being paid at all. And that is even more inconsistent with the expressed object of the Act.

A further criticism of the construction that I place upon s. 23 is that the section throughout assumes that the wages are contracted to be paid in current coin of the realm. If part of the wages contracted to be paid consists of food, so runs the argument, the second part of s. 23 can have no operation. Wage cannot be deducted from wage. With all respect I am unable to regard this as a legitimate criticism. The second part of the section is no doubt dealing exclusively with cases where the contractual wage consists wholly of coin of the realm or the substitutes for such coin permitted by s. 8. But that is no reason for confining the exceptions introduced by the first part of the section to such cases. The word wages is not to be found in that part of the section from beginning to end. I would also, in this connection, call attention to the fact that in s. 25 of the Act it is provided that within the meaning and for the purposes of the Act any money "or other thing" had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration, for any labour done or to be done . . . . shall be deemed and taken to be the wages of such labour. These words seem to contemplate that in some cases a thing other than money may properly form part of the wages of an artificer. This, however, can never be the case unless s. 23 bears the construction that I put upon it.

I have not lost sight of the fact that the stoppages or deductions permitted by the second part of s. 23 can only be made when there is an agreement or contract in that behalf in writing signed by the artificer, whereas no such contract or agreement would be requisite in the case of any exception to the provisions of ss. 1, 2 and the second part of s. 3. This may be an argument in favour of treating s. 23 as merely permitting certain deductions from wages. It is no argument

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in favour of treating it as providing an exception to s. 2 and not an exception to s. 1 and the second half of s. 3.

In my opinion s. 23 creates certain exceptions of a very limited character to the scheme and to every part of the scheme devised by the Act for ensuring that a workman shall not directly or indirectly be paid his wages except in coin of the realm or its permissible equivalent. The scheme is to be found in ss. 1, 2, 3, 5 and 6, and I can find no good or sufficient reason for excluding from the operation of s. 23 any single one of these integral parts of the scheme. This was the view of the section taken by Slesser and Finlay L.JJ., and I agree with them. I would dismiss the appeal with costs.

Appeal allowed.

Solicitors for appellant: *Corbin, Greener & Cook.*
Solicitors for respondents: *J. N. Mason & Co.*

[HOUSE OF LORDS.]

1940
Feb. 13, 14;
March 12.

HUGHES (INSPECTOR OF TAXES) . . . . APPELLANT;

AND

UTTING (B. G.) AND COMPANY, LIMITED . . . . RESPONDENTS.

Revenue—Income tax—Profits of trade—Grant of long leases of houses—Realizable value of ground rents—Premiums—Trading receipts—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.—Revenue Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 28, *Third Schedule.*

The appellants, who were builders, in the course of their business bought freehold land on which they built houses and constructed roads, sewers and drains, and then granted to tenants ninety-nine years leases of the houses and the land on which they stood, in consideration of which grant they received premiums and yearly sums by way of ground rents. The appellants never sold any ground rents, but always retained their reversionary estate in the houses in respect of which the ground rents were payable:—

Held, that until the interest in the land so retained by the lessors was sold, their whole interest had not been converted into another type of property, and their profit on the realization of the plots could not be said to have been ascertained, and, therefore, there was no present necessity for bringing into account the capital value of the annual sum.

Emery & Sons v. *Inland Revenue Commissioners* [1937] A. C. 91 distinguished.

Decision of the Court of Appeal [1939] 2 K. B. 231 affirmed.

APPEAL from a decision of the Court of Appeal (1) varying a decision of Macnaghten J. (2) upon a case stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax held on January 6, 1938, B. G. Utting & Co., Ld., appealed against assessments to income tax for the years ending April 5, 1936 and 1937, made under Case I. of Sch. D of the Income Tax Act, 1918.

The company, which was incorporated under the Companies

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(1) [1939] 2 K. B. 231.

(2) [1939] 1 K. B. 256.

* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

Act, 1929, carried on the business of builders, contractors, and developers of building estates. It owned two estates, and in the course of its trade it developed those estates by making roads, laying down sewers and drains, and erecting houses.

In a number of cases the company sold land with houses on it freehold for cash and in those cases the purchase price received by the company was brought into the company's accounts as a trading receipt, while the cost of the land and buildings were set against it as a trading expense. In other cases the company disposed of houses by granting, in consideration of a cash payment, ninety-nine years leases which were subject to a yearly ground rent of either 9*l.* 15*s.* or 10*l.* 10*s.* In those cases the cash payment was brought into the company's accounts as a trading receipt and the ground rent was brought into those accounts at a figure assumed to represent its cost, the cost of the land and buildings being debited as a trading expense. Whichever method was adopted the transaction was a transaction in the ordinary course of the company's trading.

The company had never sold any ground rents, but had always retained its reversionary estate in the houses in respect of which the ground rents were payable.

The method adopted by the company for the disposal of houses by way of ninety-nine years leases, subject to the ground rents, was that an agreement was entered into by the company with the purchaser whereby the company agreed to sell and the purchaser agreed to purchase by way of lease, for a named sum, a specified plot of land with the house erected or to be erected thereon. On payment of the purchase-money, a lease for ninety-nine years, subject to a ground rent of £——, was granted by the company to the purchaser.

Among the assets in the balance-sheet of the company at December 31, 1936, appeared the following entry:—

Materials on site, premises in course of erection, completed and unsold, undeveloped land and ground rents created and unsold	£46,882 2 8

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This sum was made up as follows :—

Ground rents created and in hand at cost	£1,374	0	0
Undeveloped land	36,035	2	8
Materials on site	9,473	0	0
	£46,882	2	8

The sum of 1374*l.* was arrived at by taking a proportionate part of the cost of the land and of the expenditure on roads and sewers. No part of the expenditure on the building was taken into consideration.

The Commissioners heard evidence by accountants that in their opinion the ground rents were stock in hand and as such were correctly entered in the accounts at cost price, that until the company sold a ground rent no profit was realized in respect thereof and it would not be correct to bring the value into account at a sum in excess of the cost, and that ground rents were readily saleable and their realizable value could be readily ascertained.

In computing the profits of the company under Case I. of Sch. D 2139*l.* had been included by the Revenue as a trading receipt in respect of the realizable value of the ground rents. That sum was computed as follows : Ground rents 93*l.* at twenty-three years' purchase 2139*l.* The company did not agree that that valuation was correct, but no evidence on the matter was called before the Commissioners, it being agreed that, if necessary, the case should be brought before them at a later date to take evidence on the question.

The Commissioners held that, where houses had been disposed of by way of ninety-nine years leases at ground rents, completed sales in the course of the company's trade had been effected, and the proceeds of those sales must be brought into the company's trading accounts, and that the correct method of dealing with those transactions in the company's accounts was to bring in as receipts from sales the amount of the premiums plus the realizable value of the ground rents at the date of the transaction.

Macnaghten J. held, following *Emery & Sons* v. *Inland*

Revenue Commissioners (1), that the amount of the premium plus the realizable value of the freehold reversion expectant on the determination of the lease at the date of the grant of the lease must be treated as receipts of the appellants in ascertaining the amount of their trading profits chargeable to income tax under Case I. of Sch. D of the Income Tax Act, 1918, for the year in which the lease was granted. He preferred the judgments of Hanna and O'Byrne JJ. in *Birch* v. *Delaney* (2) to that of FitzGibbon J. in the same case in the Court of Appeal. He said that it was conceded by the appellants that the premiums received in consideration of the granting of the leases for ninety-nine years must be brought, as a trading receipt, into the appellants' trading account for the purposes of assessment to income tax.

The company appealed to the Court of Appeal, where it was held that the house and grounds on which it stood had not been realized; that what had been realized was a term of ninety-nine years at a ground rent carved out of the freehold estate and was an unrealized asset.

The Inspector of Taxes appealed to this House.

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills* for the appellant. A profit does not cease to be such because it is realized not in money but in money's worth which, therefore, must be brought into charge. As in *Emery & Sons* v. *Inland Revenue Commissioners* (1), the annual sum payable is to be capitalized. The ground rent is something added to the reversion which goes to the landlords; it is a perfectly new thing added and is therefore taxable.

Raymond W. Needham K.C. and *John S. Scrimgeour* for the respondents. *Emery & Sons* v. *Inland Revenue Commissioners* (1) does not assist the appellant in this case. In that case the builders no longer retained any interest in the land, having sold it out and out for a ground annual, whereas in this case until the interest in the land retained by the respondents is converted into money, the profit cannot be said to have been ascertained. Here the reversion has not been sold.

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(1) [1937] A. C. 91.

(2) [1936] I. R. 517.

Sir Donald Somervell A.-G. in reply. As the value which the respondents get is referrable to rights with which they have parted, the value thereof in money's worth must come into the trading account.

The House took time for consideration.

1940. March 12. VISCOUNT CALDECOTE L.C. (read by VISCOUNT MAUGHAM). My Lords, the respondent company carried on the business of developers of building estates or, as the Special Commissioners have found, of speculative builders. In the course of its trade the company dealt with some of the houses which it had built by granting a lease for ninety-nine years. A ground rent of 9*l.* or 10*l.* was reserved by the company and a premium was paid to the company by the lessee. The company retained the reversionary estate, and sought to bring into the computation of the profits and gains of the company for the year of assessment in respect of the houses their cost only (or market value if less than cost) until the sale of the reversion. No question now arises as to the premium. The respondents have accepted the decision of the Court of Appeal that this must be brought in as a trading receipt, and I do not doubt the correctness of the view taken by the Court of Appeal on the facts of this case. The position might be different if the consideration for the lease was represented by a premium and only a peppercorn rent was reserved. On such a case I express no opinion. The Crown's appeal concerns the capitalized or realizable value of the ground rent. It is claimed that this must also be brought into the company's profit and loss account as a trading receipt.

The argument for the Crown may be shortly stated. The respondents are said to have disposed of the houses in question by granting a ninety-nine years lease in return for (1.) a premium, and (2.) a ground rent, or at any rate to have realized their whole interest for the term of ninety-nine years. The ground rent must be regarded as money's worth, and is no different in principle from the premium. Money or money's worth alike must be brought into the account as a trading receipt and the realizable value of the ground rents must be ascertained for the purpose of the account of profits and gains. The respondents, on the other hand, deny that they have parted with the whole of their interest in the houses, even for the term of ninety-nine years. As long as the reversionary estate is retained, the respondents claim to be entitled to treat the houses as part of the stock in trade of their business.

My Lords, the key to the solution of this question seems to me to be found by keeping in view the real transaction. The Attorney-General laid emphasis on the word used by the Special Commissioners to describe what was done. He said the respondents disposed of their houses. What the respondents disposed of was not the houses, but a leasehold interest, retaining the reversionary estate. The respondents have not yet disposed of their property so far as the houses in question are concerned. They may do so at any time, and the company, being speculative builders, this is likely to take place sooner rather than later. When they sell the ground rent, they will sell the reversion, and the whole of the respondents' estate will be converted into an asset which admittedly comes into the trading account. Until that happens the company, which were the freeholders before the ground rent was created and remained the freeholders after it was created, have only partially realized their property.

The decision in *Emery & Sons* v. *Inland Revenue Commissioners* (1), which was much relied on by the Crown, rested on the basis that the builders disposed of their entire interest in the land and in the houses built upon it, in return for cash and certain ground annuals. In the words of my noble and learned friend, Lord Maugham, in giving his opinion in that case, the right of ownership had by the transaction in question been converted into a different type of property, namely, ground annuals. In those circumstances the ground annuals were required to be valued for the purpose of including the

(1) [1937] A. C. 91.

proceeds of the realization of the property in the trading account, so as to compute the company's profits and gains. In the case before your Lordships the builders, the respondents, have retained, as they had a perfect right to do, an interest in the houses of a real and substantial character. This is in the ordinary exercise of the trade or business of a speculative builder who may have reasons for retaining the reversionary estate of any house or houses, until he can realize them all together, or possibly under better market conditions. I see no reason or principle which compels him to pay tax on the capitalized value of the rents which he has reserved.

My Lords, I find myself in complete agreement with the judgment of the Court of Appeal delivered by Clauson L.J., and I think this appeal should be dismissed with costs.

VISCOUNT MAUGHAM. My Lords, the question in this case may be very briefly stated. The respondents carry on the business of builders, contractors and developers of building estates. They have developed two estates by making roads, laying down sewers and drains, and building houses. In some cases they have sold land with the houses for cash. In other cases they have granted leases for ninety-nine years in consideration of premiums and yearly ground rents of 10*l.* per house or thereabouts. The respondents have not sold any of the reversions in respect of which these ground rents are payable. Where the land and houses are sold outright the amounts paid on them are brought into the respondents' accounts as trading receipts, while on the other side of the accounts the cost of the land and buildings sold is brought in as trading expenses. This is plainly on the footing that it is part of the respondents' business to build and sell houses. The premiums received where leases have been granted for ninety-nine years have also been treated as trading receipts, and no question has been raised before this House as to that being correct. The question is whether the ground rents should not be valued at so many years' purchase and whether the amounts should not, like the premiums, be taken into account as trade receipts in the year in which the leases are granted.

My Lords, it is not in dispute that the respondents are a trading company, that part of their business consists of selling these lands and houses, and that the surplus realized by them on a sale of their assets at enhanced prices is a surplus which is taxable as profit under Sch. D. Nor is it in dispute that, if their land and buildings should be sold for consols or other investments, or for annuities, or for any other realizable property, the value of the property so obtained on the realization of the assets in question must be ascertained and that the profit on the transaction will be assessable under Sch. D: *Californian Copper Syndicate* v. *Harris* (1); *Commissioners of Taxes* v. *Melbourne Trust, Ld.* (2)

It is, I think, clear that it is profit obtained on a realization that is taxable in such a case. We have therefore to decide whether the reversions retained by the respondents in the lands and houses in respect of which the ninety-nine year leases have been granted ought to be treated as part of the proceeds of realization of those properties, or whether, on the contrary, those reversions are part of the unrealized assets of the respondents with the result that unless and until they are sold the Crown cannot insist on their market value being brought into the profit and loss account of the respondents.

My Lords, I think we cannot shut our eyes to the fact that the reversions in question are in truth the freehold lands of the respondents which have been parted with by them only in so far as long leases have been granted of the lands in consideration of premiums and annual rents. I am unable to see any essential difference between this case and a case where lands have been retained subject to a twenty-one year lease which had been granted in consideration of a premium and a rent, or indeed a case where a lease has been granted at a rack-rent. In any of these instances the freehold interest is retained, and when that interest is realized the proceeds will be brought into account and the profit, so far as not already accounted for, will come into the trading account.

We were urged to say that the freehold interests retained were in substance wholly new interests, and that, again "in

(1) (1904) 5 Tax Cas. 159.

(2) [1914] A. C. 1001, 1010.

"substance," the respondents had parted with their rights in the lands for ninety-nine years. This, of course, wholly neglects the legal aspect of the case and, as I think, disregards also the popular and practical view of the position. The landlord in such a case has a good deal more than his right to the rent. The restrictive and repairing covenants which are entered into by the tenant are often of vital interest to the landlord, to the tenant, and even to the neighbourhood. The landlord may obtain in cases of breach of covenant an immediate right to re-enter. If the house is burnt down his rights are sometimes of paramount importance. The Income Tax Acts have always proceeded on the basis that the owner of the reversion, even if leases at ground rents for long terms have been granted, is to be charged under Sch. A "in respect of" his "property in all "lands, tenements, hereditaments and heritages" according to the annual value thereof.

My Lords, I do not think there is any real foundation for the argument that the respondents in retaining their reversions ought to be treated as having retained nothing but annuities for ninety-nine years. In the case of *Emery & Sons* v. *Inland Revenue Commissioners* (1) that was, with unimportant differences, what the taxpayers had retained in the form of Scottish "ground "annuals" payable in perpetuity; and it was precisely because they had parted in substance with all right of ownership in the houses and land attached thereto that this House, affirming the Court of Session, held that the ground annuals must be included at their market value in the trading accounts for the purpose of ascertaining the profits made by the taxpayers in the year in question. It may be mentioned that ground annuals are very similar to rentcharges in England and that Lord Dundas in the case of *Church of Scotland Endowment Committee* v. *Provident Association of London* (2) observed: "Ground annual "is not a vox signata; I think it simply means a perpetual rent "charge secured in some effectual fashion as a real burden on "land." There is, I think, no difficulty in distinguishing the *Emery* case (1) from the one now before your Lordships.

My Lords, I agree with the conclusion arrived at by the

(1) [1937] A. C. 91.

(2) 1914 S. C. 165.

Court of Appeal and with the reasons given for it. I am therefore of opinion that this appeal should be dismissed with costs.

LORD RUSSELL OF KILLOWEN (read by LORD ROMER). My Lords, I would dismiss this appeal. I cannot help thinking that some confusion may have been introduced into the case by the wording of the documents used by the respondents, when instead of realizing a plot at once and in a single transaction by parting with the fee simple, they demise it for a term of years and keep unsold, at all events for the time being, the reversion expectant on the determination of the term. In the documents which they use on those occasions, the transaction is incorrectly described as a sale and purchase, which it most certainly is not. This, it appears to me, may have been the foundation of the statement by the Commissioners that the company's houses when completed "are disposed of by the company by way of "sale" and may have led the Commissioners to regard the granting of a lease as a complete and final realization by the company of its profit on that particular plot of land.

My Lords, I cannot take this view. The value of the reversion, though no doubt directly related to the rent reserved by the lease, may vary from time to time ; and the company has full power under its memorandum of association to retain the reversion unsold and to collect the rent. Until it sells the reversion (and the Commissioners find that the company has not yet sold any reversions) the company has not ceased to be interested in the plot, and its profit on the realization of the plot has not been finally ascertained.

This is not a case like *Emery's* case (1), in which the builders no longer retained any interest in the land. They had sold it out and out for a ground annual, the capital value of which at the date of the sale had of necessity to be brought into account for the purpose of ascertaining the amount of the profit made on the out and out sale. The vendors' whole interest had been converted from land into another type of property. In the present case until the interest in the land which the lessor has retained is sold, his whole interest has not been converted

(1) [1937] A. C. 91.

into another type of property, and his profit on the realization of the plot cannot be said to have been ascertained. There is no present necessity, as in *Emery's* case (1), for bringing into account the capital value of the annual sum. That will, in effect, be brought into account at the proper time, namely, when the reversion is sold, and the proceeds of that sale are credited to the trading and profit and loss account for the year in which the sale is effected.

LORD WRIGHT. My Lords, I agree with your Lordships that the appeal should be dismissed. I think that the reasoning of the judgment of the Court of Appeal delivered by Clauson L.J. is correct. The claim of the Crown is admittedly novel. It is based on certain propositions which as I understand them may be briefly stated to be as follows: The respondents it is said on the appellant's behalf, are being taxed as traders under Sch. D. The trade is to dispose of completed houses and the profits come from the difference between the cost of the production and the proceeds of realization. If the respondents sell the freehold outright, the position is clear. If they dispose of the house by a ninety-nine or a nine hundred and ninety-nine years' lease, it is equally clear that they are selling the house for a composite but still single consideration, which consists of the premium and the ground rent. Both these elements, it is said, are on a parity, the premium is money and the ground rents, which are immediately marketable, are money's worth which should be expressed in terms of a sum in cash and this sum should be added to the premium so as to give a single sum which will then correspond to the price when the freehold is completely realized. In the case of the long lease, it is said, the entire interest of the builder is, in fact, realized. The house goes out of his balance sheet, because in a business sense or in substance he has no further interest in it. The cash premium and the realized or realizable value of the ground rents take the place of the house. The freehold reversion is thus of no practical or business value. Such are the propositions advanced by the Crown.

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(1) [1937] A. C. 91.

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Lord Wright.

I think this way of putting the case is not sound either in law or in a practical or business sense. The speculative builder creates by his expenditure certain assets, including completed houses. So long as the houses are not sold or otherwise disposed of, they go into his accounts at cost or market value, whichever is lower. When the freehold is completely disposed of, the sums realized take the place of the house and show a profit or a loss, as the case may be. But when, instead of the house being sold, it is let on a long-term lease at a ground rent, there is not a complete but a partial realization. An interest is carved out of the freehold. The residue of the complete freehold estate is not disposed of but is retained by the builder. That interest is the freehold reversion, which normally includes the right to the ground rent, the right to enforce the restrictive covenants in the lease, the right of re-entry for breach of covenants, and the right to resume possession at the end of the term. That is an estate which, in the case envisaged, is not traded away by the speculative builder. It is not correctly described as a new asset, but is a residue of the original asset. The house must now be represented in the accounts by the premiums and the freehold reversion, in practice often described as "the ground "rents," and entered at cost or market value, whichever is lower. The speculative builder may find this method of disposing of the houses is in certain cases more convenient or profitable to him. He may keep the "ground rents" in hand until he decides to dispose of them. Until he does dispose of them, he cannot in my opinion be taxed on a profit on the footing that it has been realized in the year of charge when it has never been realized and may never be realized at all. He cannot in such a case be taxed on a notional profit. When he does "sell the ground rents," the proceeds will then be brought into charge in the appropriate year. According to the evidence of the accountants, set out in the case, this is the practice commonly adopted. I think it is correct.

The Crown have argued that the issue is here determined by the findings of fact by the Commissioners. It seems to be said that the business of the respondents is only to realize the houses, not to hold them on rental or to use them for income as would be the case if they let them on a rack-rent for a period, and therefore they must be somehow treated as if they had realized them outright in a case like that now in question. But it is clear that to grant a ninety-nine years' lease is not ultra vires of the respondent company, and the facts stated in the case show that in the case of a substantial number of the houses they are leased for ninety-nine years and not sold outright, and that the method of dealing is not infrequently adopted by the respondents. There is no evidence to justify a finding that the business of the respondents is in fact limited to selling houses outright.

I do not regard *Emery & Sons* v. *Inland Revenue Commissioners* (1) as laying down any general principle, except perhaps that in the particular circumstances of that case a presently realizable value might be treated as if it had been turned into cash. That case turned partly on the particular character of ground annuals in Scots law, and partly on the circumstances, in particular that the property was completely disposed of, not leased for ninety-nine years or some other period. I cannot treat it as governing this appeal.

LORD ROMER. My Lords, if the gentleman who attends to the conveyancing side of the respondents' business had been a little more familiar with the terms usually employed by the practitioners in that art, it is, I think, at least possible that your Lordships would never have been troubled with this case. It is, indeed, one that furnishes a remarkable illustration of the confusion that may result from the use of inaccurate language. Such language in the present case is to be found in the form of agreement that the respondents employ when they adopt the course of granting a lease of one of their houses instead of disposing of it by way of sale.

By such agreement, in which the proposed lessee is described as "the purchaser," the company purports to agree "to sell" and the lessee purports to agree to "purchase by way of lease" for the sum therein specified the particular land and house in question. It then fixes the date for completion and provides that upon completion a lease of the property will be granted to the

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(1) [1937] A. C. 91.

"purchaser" for a term of ninety-nine years, at the ground rent therein specified. But the expression "a sale by way of lease" is a contradiction in terms. A sale is the antithesis of a lease. The owner of a freehold house may sell it, or he may retain it. In the former case he will receive in money or, as in *Emery's* case (1), in money's worth the value of the house based upon its income-producing potentialities. In the latter case, assuming that he does not occupy it himself, he will retain it as an income-producing investment, and will obtain the income by means of letting it upon lease. It would be wholly inaccurate in that case to say that he is "selling" the house by way of lease. He is doing nothing of the kind, whether the lease be short or long, and whether he exacts a premium which is merely an anticipation of future income, or relies solely upon an annual or monthly or weekly rent.

The inaccurate language used in the agreements for a lease in the present case would, however, have been quite harmless had it not misled the inspector of taxes. Treating the agreements for a lease and the leases granted in pursuance of those agreements as being in truth what the agreements falsely described them as being, sales of the houses in question, he not unnaturally asked himself what consideration had been received by the respondents on such sales. For without doubt the net proceeds of all sales effected by the respondents must be brought into account as trading receipts. To the question so put to himself by the inspector of taxes there could be only one answer, assuming that the leases were really sales. The consideration in each case consisted of the premium and the value of the rent reserved. When the matter was brought on appeal before the Commissioners for the Special Purposes of the Income Tax Acts they were equally misled. What they said was this:—

"In the course of its trade the company buys land, develops "it and builds houses thereon, and the houses when completed "are disposed of by the company by way of sale.

"In some cases houses and land are disposed of freehold. "In other cases leases for nine-nine years are disposed of at

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(1) [1937] A. C. 91.

"premiums and ground rents of either 9*l.* 15*s.* or 10*l.* 10*s.* per "annum.

"Whichever method of disposal is adopted the transaction "is a transaction in the course of the company's trading."

And later on :—

"Upon the documents and facts before us we hold that where "houses have been disposed of by way of ninety-nine years' "leases at ground rents, completed sales in the course of the "company's trade have been effected, and in our opinion the "proceeds of those sales must be brought into the company's "trading accounts."

If these were findings of fact there would be no more to be said. But they are erroneous conclusions of law of which the origin is to be traced back to the inaccurate language employed by the gentleman to whom reference has been made in the first line of this judgment.

What the Commissioners should have concluded from the documents and facts before them was that the company in the course of its trade sometimes effected sales of its houses, but sometimes retained the houses and granted leases of them for ninety-nine years in consideration of a premium and a rent. In the former case the purchase consideration in money or money's worth must be brought into account as a trading receipt. In the latter case the premium must also be brought into account under Case I. of Sch. D as a trading receipt if the Crown elects so to do; but the rent will represent a profit arising to the company in respect of which it is only taxable under Sch. A.

That the premiums can be treated as a trading receipt under Case I. of Sch. D was decided by the Court of Appeal, and the correctness of such decision is not now challenged by the respondents. Their contention before that Court had been that the premiums were "fines" within the meaning of Sch. A, No. II., r. 6. The Court of Appeal did not find it necessary to decide that point in view of the fact that if they were "fines" they became chargeable under Case III. of Sch. D by virtue of the transfer of such receipts from Sch. A to Sch. D effected by the Finance Act, 1926. But the premiums were certainly trading receipts of the respondents, and as such could, since the transfer, be taxed under Case I. of Sch. D if the Crown should elect so to do, even if they were fines and could as such also be taxed under Case III. of that Schedule.

The Court did not, however, treat the premiums as being the consideration received on a sale. It is no doubt true that if a lease for ninety-nine years or any other long term were to be granted by the respondents at a peppercorn rent in consideration of a premium, the premium would almost certainly be equivalent to the purchase money that could be obtained upon a sale of the freehold, and the reversion would have no appreciable value. The reversion would nevertheless exist as an asset of the respondents, and the transaction, though differing in no way from a sale in its material results, could not even then be accurately described as one.

For these reasons I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Royds, Rawstorne & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1940
Feb. 1, 5, 6,
7; Mar. 14.

FIFE COAL COMPANY, LIMITED . . . APPELLANTS;

AND

WILLIAM YOUNG . . . . RESPONDENT.

Workmen's compensation—"Accident"—Dropped foot due to continuous kneeling in mine—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1.

The respondent, whose work as a packer in a coal mine necessitated continual kneeling, had for some time suffered from loss of power of dorsiflexion of the right foot, and on April 27, 1938, feeling that foot numb he had to cease work, and could only walk home with difficulty. His condition was subsequently diagnosed as "dropped foot," that is, a paralysis of the muscles of the leg caused by pressure on the peroneal nerve which prevents dorsiflexion of the foot, and he became totally incapacitated:—

Held, that the condition of "dropped foot" which resulted from his work was an injury by accident within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, which entitled him to compensation.

Decision of the First Division of the Court of Session, 1939 S. C. 608 affirmed.

APPEAL from a decision of the First Division of the Court of Session. (1)

The respondent Young was a packer employed in the appellants' coal mine, his duty being to build pillars to support the roof of the underground workings, and he had to do this work in a confined space, which necessitated continual kneeling. For a period of about a month before April 27, 1938, he had suffered from some loss of power of dorsiflexion of the right foot, and on that day, feeling it numb, he had to cease his employment after working for a short time, and he was only able to walk home with difficulty. His condition was subsequently diagnosed as "dropped foot," i.e., a paralysis of the muscles of the leg, caused by pressure on the peroneal nerve, which prevents dorsiflexion of the foot, and he became totally incapacitated.

**Present:* VISCOUNT CALDECOTE L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROMER.

(1) 1939 S. C. 608.

On a claim by Young for compensation under the Workmen's Compensation Act, the arbitrator found that the incapacity was due to repeated pressure on the outside of the right knee when he was working in a crouching position in the course of his employment; that incapacity from dropped foot arising in this manner was a comparatively rare condition; and he held that the claimant's incapacity did not result from personal injury by accident arising out of and in the course of his employment, and therefore that the employers were not liable to pay compensation.

On appeal by the claimant, the First Division of the Court of Session reversed the decision of the arbitrator, holding that on April 27, 1938, a definite change had occurred in his condition, and that the condition of dropped foot which resulted was an "injury by accident" within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, entitling him to compensation.

The employers appealed to this House.

A. G. Erskine Hill K.C. and *A. G. Walker* (both of the Scots Bar) and *A. M. Wallace* for the appellants. The respondent suffered no injury by "accident" within the meaning of the Act and was therefore not entitled to compensation. What in fact happened was the gradual development of an industrial disease, which is not a scheduled disease, the injury being due not to an accident but to the imperceptible progress of the disease aggravated by the work the respondent was doing. An "accident" is a mishap or untoward event not expected, causing the injury: *Fenton* v. *Thorley & Co., Ld.* (1), and that was not the case here.

[LORD ROMER. The question is, was there a physiological change for the worse in the respondent's condition on a particular occasion while he was at work?]

We submit not. In *M'Millan* v. *Singer Sewing Machine Co., Ld.* (2), where a workman became "sweated" and contracted a chill which developed into pleurisy, it was held that he had failed to aver an "accident." Again, in

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(1) [1903] A. C. 443.

(2) 1913 S. C. 346.

Marshall v. *East Holywell Coal Co.* (1), where miners contracted, the one "beat hand" and the other "beat knee," it was decided that these injuries were not caused by "accident" within the meaning of the Act. The same was held in *Walker* v. *Hockney Brothers* (2), where a workman gradually acquired paralysis in his leg through the strain of riding a heavy carrier tricycle for his employer, and this condition at the end of five years incapacitated him for work. In *Williams* v. *Guest, Keen and Nettlefolds, Ld.* (3), the gradual inhalation by a workman of particles of silica, before silicosis was a scheduled disease, was held not to amount to an "accident," and therefore the workman was not entitled to compensation under the Act. So, too, in *Coe* v. *Fife Coal Co., Ld.* (4), where a miner was injured, not by any sudden jerk, but by the repeated excessive exertion in holding a hutch, it was held that he had not suffered injury by "accident." In *Walker* v. *Bairds & Dalmellington, Ld.* (5), where the evidence established that the chill which caused the death of the workman had arisen out of and in the course of his employment, it was held that his widow was entitled to compensation; but where the workman's incapacity was shown to be due to the imperceptible progress of disease and not to any event which had occurred in the course of his employment, the claim for compensation failed: *Miller* v. *Carntyne Steel Castings Co., Ld.* (6) That, we submit, is precisely in point in the present case.

A. P. Duffes K.C. and *James Walker* for the respondent were not called upon.

The House took time for consideration.

1940. Mar. 14. VISCOUNT CALDECOTE L.C. This is an appeal from the First Division of the Court of Session allowing an appeal from an award of the Sheriff-Substitute of Fife and Kinross in an arbitration under the Workmen's Compensation Act. The facts appear partly from a statement by the Sheriff-Substitute of admissions at the Bar by agents for the parties,

(1) (1905) 93 L. T. 360.
(2) (1909) 2 B. W. C. C. 20.
(3) [1926] 1 K. B. 497.
(4) 1909 S. C. 393.
(5) 1935 S. C. (H. L.) 28.
(6) 1935 S. C. 20.

and partly from a note of facts found by the Sheriff-Substitute to be proved. The two statements to some extent overlap. Notwithstanding a submission by counsel for the appellants towards the end of his argument that there should be a remit to the arbitrator for a further statement, the facts seem to me to be clearly stated and are sufficient to enable this appeal to be determined.

The claimant had been employed by the appellants for about a month preceding April 27, 1938, as a packer in building pillars to support the roof of the underground workings at Kinglassie Colliery. At the place where he worked the height of the roof was only 2½ to 3 feet; and the position he normally adopted in doing his work as a packer was a crouching attitude with the outside of his right knee pressing on the pavement. During the month for which the claimant was working as packer he suffered from some loss of power to dorsiflex his right foot, or in other words to raise the front part of his right foot upwards. On April 27, while engaged in his ordinary work as a packer, towards the end of his shift he worked in the crouching position already described. After about twenty minutes he felt his right foot numb. He finished his shift and was then able to walk home with the assistance of his father, who was working with him. The claimant consulted his usual medical attendant, who diagnosed his condition as suffering from dropped foot. "Dropped foot" is a paralysis of the muscles of the leg caused by pressure on the peroneal nerve, which passes over the bone below the knee, and resulting in inability to raise the front part of the foot upwards. Incapacity from dropped foot arising in this manner is a comparatively rare condition.

The claimant claimed compensation in respect of injury by accident sustained on or about April 27. His incapacity was admitted to have arisen out of, and in the course of, his employment, and the only question which your Lordships have to decide is whether on these facts the Sheriff-Substitute was entitled to find that the claimant's incapacity was not due to injury by accident within the meaning of s. 1 of the Workmen's Compensation Act. The First Division of the

Court of Session held that the Sheriff-Substitute was not entitled so to find, and from that decision this appeal arises.

The phrase "injury by accident" as used in successive Workmen's Compensation Acts has been the subject of repeated and elaborate discussion, and in the course of the forty years or more which have passed since the first decisions under the Act of 1897 it is possible, as Lord Tomlin pointed out in a case which I shall mention, to trace a gradual but steady extension of its meaning. The early cases seem to have been decided on the footing that "accident" was to be interpreted in the sense in which it was understood in policies of insurance as describing some event of a fortuitous and unexpected character. The first case that came to your Lordships' House was the case in which the workman had ruptured himself by an act of over-exertion: *Fenton* v. *Thorley & Co., Ld.* (1) The decision reversing the award of the arbitrator and the Court of Appeal was in favour of the workman. Lord Macnaghten came to the conclusion that the expression "accident" was used in the Act "in its popular and ordinary sense as denoting an "unlooked-for mishap or an untoward event which is not "expected or designed." He disapproved the use of the word "fortuitous" as a test, and, on the other hand, quoted with approval a passage from Lord M'Laren's opinion in *Stewart* v. *Wilsons and Clyde Coal Co., Ld.* (2): "If a workman "in the reasonable performance of his duties sustains a "physiological injury as the result of the work he is engaged "in . . . . this is accidental injury in the sense of the "statute." Lord Robertson understood "accident" to be not a technical legal term with a clearly defined meaning. "Speaking generally," he said (3), "but with reference to legal "liabilities, an accident means any unintended and unexpected "occurrence which produces hurt or loss." These statements and the decision in favour of the workman opened the door to claims which up to that time had failed. It is easy to be wise after the event, but to-day *Fenton* v. *Thorley & Co., Ld.* (1) seems a very clear case.

(1) [1903] A. C. 443.
(2) (1902) 5 F. 120.
(3) [1903] A. C. 453.

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The anthrax case, *Brintons, Ld.* v. *Turvey* (1), was much more difficult, as may be seen from the opinion of Lord Robertson, who with undeniable force protested against the extension of the definitions given in *Fenton* v. *Thorley & Co., Ld.* (2), in such a way as to cover disease. In view of a later decision, to which I shall refer, it is of some interest to observe Lord Robertson's opinion that nobody could think of saying that a man who had caught cold had met with an accident. Notwithstanding Lord Robertson's protest, it was held that the workman, who had contracted the disease of anthrax by infection while sorting wool, had suffered "injury by accident."

The two cases, one of "beat hand" and the other of "beat "knee," which came before the Court of Appeal very shortly after the decision of your Lordships' House in *Brintons, Ld.* v. *Turvey* (1) followed a different line. They were each decided in favour of the employer—*Marshall* v. *East Holywell Coal Co.* (3) and *Gorley* v. *Backworth Collieries* (4), on the grounds that the injury was the inevitable result of work long continued, and was not anything which could be described as having happened on a particular date. *Walker* v. *Hockney Brothers* (5), the case of the man who gradually over a period of five years acquired paralysis by riding a carrier bicycle, was another decision in favour of the employer. There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases the workmen failed, not because a disease was outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged.

When the workman's claim is in respect of a progressive disease the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in

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(1) [1905] A. C. 230.
(2) [1903] A. C. 443.
(3) (1905) 93 L. T. 360.
(4) (1905) 93 L. T. 360.
(5) 2 B. W. C. C. 20.

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the case of certain diseases and later by an enlargement of the schedule of industrial diseases, relieved the workmen in the specified cases of this obligation. But if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurism as in *Clover, Clayton & Co., Ld.* v. *Hughes* (1), or heart failure as in *Falmouth Docks and Engineering Co., Ld.* v. *Treloar.* (2)

The decision and the reasons for the decision given in your Lordships' House in *Innes* v. *Kynoch* (3) lend support to this view. There the workman was engaged in handling artificial manures which contained poisonous germs, and on a day while doing this work he became ill with blood-poisoning, and three weeks later died. It was impossible to say with certainty when the infection occurred, though it was probably some days before the man became ill. The Lord Chancellor, Lord Birkenhead, in referring to the fact that the particular time and place of the poisoning could not be definitely ascertained, said: " All that is material is that the infection should have "been the result of contact at some one particular time and "that this one particular time should have been during the "course of the employment." Lord Buckmaster thought that a finding that the infection was due to the impregnation of germs acquired in the course of and arising out of the claimant's employment was not as a matter of common sense too remote, and brought the case within the decision in the anthrax case (*Brintons, Ld.* v. *Turvey* (4)).

My noble and learned friend Lord Atkin, as Atkin L.J., in two of the later cases plainly foreshadowed the further development of the meaning of accident. In *Williams* v. *Guest, Keen & Nettlefolds, Ld.* (5), he felt himself bound by a decision rejecting the claim of a workman who had gradually accumulated lead in his system: *Steel* v. *Cammell, Laird & Co., Ld.* (6), to arrive at a similar decision in the case of silicosis,

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(1) [1910] A. C. 242.
(2) [1933] A. C. 481.
(3) [1919] A. C. 765.
(4) [1905] A. C. 230.
(5) [1926] 1 K. B. 497, 507.
(6) [1905] 2 K. B. 232.

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which was not then a scheduled industrial disease. My noble and learned friend abstained from expressing any final view as to what the position would have been if it were not for the lead poisoning decision, though on the authority of *Innes* v. *Kynoch* (1) he thought it was not necessary to prove the precise day, time and place at which the accident happened. In *Cole* v. *London and North Eastern Ry. Co.* (2), which was a case of injury by a dust disease, my noble and learned friend Lord Atkin, as Atkin L.J., referred to his observations in the silicosis case, and, notwithstanding his opinion that the legal definition of " accident " was gradually approximating to the conception of a disease, again felt himself bound by the earlier decisions to reject the workman's claim. In *Ormond* v. *Holmes & Co., Ld.* (3), the workman was bound to fail, having regard to the finding that the work on which he was actually engaged when he collapsed from a stroke following high blood pressure " neither caused nor contributed to nor accelerated "the second stroke." The case is merely an illustration of the necessity of establishing facts which justify a finding that the injury was due to some specific unlooked-for mishap or untoward event. Where those facts are not proved the workman cannot succeed, and it makes no difference whether the incapacity is due to such an injury as a rupture or sprain, or to a disease. For instance, *Partridge, Jones and Paton, Ld.* v. *James* (4) was a case where the workman's widow succeeded, in spite of the fact that the workman was suffering from a severe arterial disease. The basis of the decision that there had been injury by accident was that the heavy work in which he was engaged produced a fatal attack of angina pectoris. Lord M'Laren's statement, to which I have already referred, was once more quoted with approval in the only opinion which was given in your Lordships' House.

Two other authorities mark the latest stage in the process which Lord Tomlin in *Walker* v. *Bairds & Dalmellington, Ld.* (5) thought had reached its extreme limit. The workman, a colliery foreman, had died from bronchial-pneumonia caused by a chill contracted through exposure to cold and water while cleaning a sump. His widow was held entitled to an award on the ground, as Lord Tomlin said, that the disease, namely, the pneumonia, resulted from the sudden and unexpected onset of a chill contracted in conditions that were normal in carrying out his job in the accustomed manner and had been frequently experienced by him on previous occasions without ill results. The onset of the chill was "an untoward "event" and not "expected or designed."

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(1) [1919] A. C. 765.
(2) (1928) 21 B. W. C. C. 87, 95.
(3) (1937) 30 B. W. C. C. 254.
(4) [1933] A. C. 501.
(5) 1935 S. C. (H. L.) 28, 30.

Finally, in *Walkinshaw* v. *Lochgelly Iron and Coal Co.* (1), a brusher in a pit, who, though apparently in good health, had long suffered from heart and kidney disease certain to result sooner or later in a cardiac breakdown, and one day had to stop working owing to sudden pain and choking, succeeded. Lord Tomlin said: "The hard work on which the claimant was engaged induced the breakdown of his enfeebled heart. This involved a definite change in his condition on 29th April."

I find it impossible to distinguish in principle the present case from the case I have last mentioned. The pressure on the peroneal nerve during a spell of work on April 27 brought about the paralysis of the claimant's muscles which is described as "dropped foot." I apply Lord M'Laren's test—often quoted and always with approval. The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was at the time of the injury engaged in. The fact that, in the course of his work for a month before the day when he first suffered from dropped foot, he had felt some loss of the power of dorsiflexion of the right foot, seems to me in no way to affect his right to compensation.

I agree with the opinions given in the Court of Session. Accordingly I move that this appeal be dismissed with costs.

LORD ATKIN. The question in this case is whether the respondent proved that personal injury by accident arising out of his employment had been caused to him. I need not

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(1) 1935 S. C. (H. L.) 36.

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recapitulate the facts stated in the opinion of the Lord Chancellor. I agree with his view of the findings of the Sheriff-Substitute. In Lord Fleming's words: " What happened to "him on 27th April transformed him from a man who was not "suffering from dropped foot into a man who was." If this be the true result of the findings I cannot see that any doubt that the man suffered an injury by accident can arise. It is a physiological change brought about by an undesigned untoward event happening in the employment; and if the elements of suddenness or of the event happening on a specified day are material, those elements in this case exist. Accordingly it is unnecessary to consider the forcible argument of Mr. Erskine Hill that the facts in this case are analogous to the slow and continuous onset of a disease in the course of which no event occurs of which place and time can be specified, and as a result according to the argument no " accident " could have occurred. I reserve, therefore, any question affecting the necessity of being able to specify an event with details of time and place before concluding that there has been an accident.

There are two topics, however, upon which I wish to make some remarks.

(1.) The legal conception of " accident " within the meaning of the Workmen's Compensation Act has undoubtedly been enlarged in the more recent decisions. Such a broadening of view was plainly foretold by Lord Birkenhead in *Innes* v. *Kynoch* (1), as the result of the acceptance of the decision of this House in *Brintons, Ld.* v. *Turvey* (2), that the invasion of a workman's body by a bacillus derived from the employment is an accident. In *Brinton's* case (2) it was anthrax; in *Innes's* case (1) it was streptococci derived from bone dust.

(2.) It is necessary to emphasize the distinction between " accident " and " injury," which in some cases tend to be confused. No doubt the more usual case of an " accident " is an event happening externally to a man. An explosion occurs in a mine, or a workman falls from a ladder. But it

(1) [1919] A. C. 765, 770–71. (2) [1905] A. C. 230.

is now established that apart from external accident there may be what no doubt others as well as myself have called internal accident.

A man suffers from rupture, an aneurism bursts, the muscular action of the heart fails, while the man is doing his ordinary work, turning a wheel or a screw, or lifting his hand. In such cases it is hardly possible to distinguish in time between " accident " and injury; the rupture which is accident is at the same time injury from which follows at once or after a lapse of time death or incapacity. But the distinction between the two must be observed. The incidence of a bacillus may be an accident, and an accident arising out of the employment, as in the anthrax and the streptococci from bone dust cases. In such cases the employment gives rise to the bacillus, the fact that it finds a suitable entrance in an existing wound, scratch, or other orifice which themselves are not due to the employment is irrelevant. They may be "accidental," but if that accident is not related to the employment it matters not. On the other hand, the employment may give rise to the wound or scratch through which a non-employment bacillus enters. In such cases the accident has caused the wound or scratch which is the injury. Without the bacillus the injury is trifling, with the bacillus the injury becomes so aggravated that it causes incapacity or death. Compensation is awarded because the incapacity so caused is the direct result of the accident, just as if negligence causes a wound the party negligent has to pay in full whether the wound heals or becomes infected from outside, excepting possibly cases where it could be said that a new agency intervened.

Whether to constitute an accident each employment bacillus or flight of bacilli must have its own day, or whether the gradual effect of a succession of them in poisoning the system can be said to be injury by accident is the question reserved in this decision. In the present case it may well be that the impact of the ground upon the knee in the crouching position due to the employment produced an injury each time it pressed upon the peroneal nerve and so affected the foot muscles associated with that nerve. In such a case there would be a succession of injuries due to accident by the untoward and undesigned pressure on the knee. But whether that be so or not, there can be no doubt that on July 27 the pressure on the knee for a period of thirty minutes resulted in the injury of "dropped foot." Whether that was the result of a series of preceding injuries appears to me to be irrelevant. In this discussion I have not thought it necessary to deal specifically with the authorities. They are fully considered in the opinion of the Lord President, with which I respectfully and completely concur. I agree that the appeal should be dismissed.

LORD ROMER. I concur.

VISCOUNT CALDECOTE L.C. My noble and learned friends Lord Thankerton and Lord Russell of Killowen desire me to say that they concur in my opinion.

Appeal dismissed.

Solicitors for appellants: *Beveridge & Co., for Wallace, Begg & Co., W. S., Edinburgh, and J. A. McAra, Glasgow.*

Solicitors for respondent: *Kenneth Brown, Baker, Baker, for J. & A. Hastie, S. S. C., Edinburgh, and MacBeth, Currie & Co., Dunfermline.*

MELLOR AND OTHERS . . . . APPELLANTS ;

AND

AUSTRALIAN BROADCASTING COMMISSION . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION.

Australia (New South Wales)—Copyright—Performing right—Band music—Sold "free for public performance" to subscribers—Broadcast by subscriber band—No breach of performing rights by broadcasting authority—Imperial Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2—*Australian Copyright Act,* 1912 (*No.* 20 *of* 1912), *s.* 8.

The appellants, publishers of band music, were the owners of the sole right of performing in public within the Commonwealth of Australia a large number of musical works arranged for performance by brass and military bands. They published and circulated each year to bands, band organizations and music sellers in Australia a pamphlet, entitled "The Liverpool Brass "and Military Band Journal," referring to the musical works published by them, and containing a statement of the terms or prices for purchase of the music of their pieces. The pamphlets contained (inter alia) the following statements: "Please note: "All our music is Free for Public Performance. To the Bands of "the British Empire . . . . All our subscribers should note "especially that all our music is 'Free for Public Performance' "anywhere. See our guarantees below . . . ." The guarantees provided (inter alia) "We have paid for the performing rights "of every piece we issue, and no Band will buy L. J. [Liverpool "Journal] music and discover later that they must not play it at "an engagement without paying fees to someone else." The respondent broadcasting authority having engaged bands, who had purchased pieces of music on the terms and with the guarantees set out in the appellants' pamphlets, to play some of the copyright works of the appellants, broadcast the performances. In an action by the appellants against the respondents founded on alleged infringement of copyright:—

Held, it being admitted by the respondents that there were performances in public of the works in question for which they were responsible if in the circumstances there was no consent by the appellants to such performances, that the language used in the pamphlets was a consent to the public performance of the

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* *Present:* VISCOUNT MAUGHAM, LORD PORTER, and SIR GEORGE RANKIN.

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works by the respondents. The right to perform a musical piece by means of a broadcast is a right comprised in "the sole right ". . . . to perform . . . . the work . . . . in public" conferred by s. 1, sub-s. 2, of the Imperial Copyright Act, 1911, which, so far as relevant, is in force in Australia, and therefore the licence or consent given in the pamphlets included the broadcasting by bands. The respondents were accordingly entitled to engage bands to do that which they were permitted to do—to broadcast—and had not committed a breach of the appellants' performing rights by authorizing the bands to broadcast.

Judgment of the Supreme Court of New South Wales in its Equitable Jurisdiction affirmed.

APPEAL (No. 29 of 1939), by special leave, from a judgment of the Supreme Court of New South Wales in its equitable jurisdiction (December 10, 1937).

The appellants, who carried on business in England in partnership under the name of Wright and Round, as publishers of band music, were at all material times the owners of the sole right of performing in public within the Commonwealth of Australia a large number of musical works arranged for performance by brass and military bands. During the years 1932 to 1935 the appellants published in England and circulated to bands and band organizations and music sellers throughout Australia pamphlets or prospectuses referring to the musical works published by them; the pamphlets were entitled "The Liverpool Brass and Military "Band Journal," and contained (inter alia) the following statements: "Please note all our music is free for public "performance. To the Bands of the British Empire. . . . . "All our subscribers should note especially that all our music "is free for public performance anywhere. See our guarantees "below, show them to your patrons, so that they may rest "assured that none of our publications will bring them any "trouble over performing fees. We make one price cover "both the music and the performing rights thereof. . . . ." The guarantees stated (inter alia): "We guarantee that "every piece published in the L. J. can be played anywhere "by anyone without fear that any composer or society will "pounce upon any band for performing fees. We have paid "for the performing rights of every piece we issue. . . . ."

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The respondents, the Australian Broadcasting Commission, during 1932 and 1933 engaged bands, who had purchased pieces of music on the terms and with the guarantees set out in the appellants' pamphlets, to play some of the copyright works of the appellants, which they, the respondents, caused to be broadcast. The appellants on January 15, 1935, brought an action against the respondents for breach of copyright by reason of the broadcasting, and claimed an injunction and an account of profits, or alternatively, damages.

The facts and the terms of the pamphlets appear more fully from the judgment of the Judicial Committee.

The trial judge (Nicholas J.) dismissed the action, holding that on the language of the pamphlets the musical works were performed and broadcast with the licence or implied consent of the appellants.

The appellants now appealed.

1940. Jan. 23, 25. *Maxwell Fyfe K.C.* and *Hartley Shawcross K.C.* for the appellants. The general question raised is as to the rights of owners of copyright in musical, literary or dramatic works, the performance of which by persons licensed to perform them is broadcast by a third party without further licence.

[*R. F. Roxburgh K.C.*, for the respondents: The respondents are not challenging before this Board the general proposition that to broadcast music without consent is an infringement of copyright, and they admit that there were performances in public for which they are responsible if in the circumstances there was no consent to such performances.]

Maxwell Fyfe K.C., continuing: It is common ground that the broadcast by the respondents of musical works of which the copyright is owned by the appellants was made without the consent of the appellants save in so far as the consent was given by, or should be taken to have been given by, or inferred from the terms of the pamphlets. The appellants contend that this is a limited licence to bands, and that if a limited licence is given to bands to perform the music freely, that does not mean that a third party—a broadcasting commission, makers of gramophone records, or anybody else—can render another performance. The respondents submit that this is a licence to the world in general, or, alternatively, that in giving that licence the appellants empowered the Broadcasting Commission to broadcast the works in question. The first point is whether the pamphlets give an express licence to anyone to perform the pieces; the second, whether, if there is not an express licence to anyone, the fact that the right of free performance is given to bands implies a right to broadcast given to the respondent Commission. The first point raises a question of the construction of the document, and it should be noted—(*a*) that it is addressed to bands, and (*b*) that the material passage is headed " To the Bands of the British Empire," and it is submitted that it is a quite unreasonable construction of the document to infer a general licence to the world to play the music when it is limited both by the lay-out of the document and by its contents to the needs and requirements of bands. With regard to the guarantees, it is submitted that the words "anywhere, by anyone" are immediately qualified by the words " without fear that any composer or society will pounce "upon any band for performing fees." The licence can only be to the purchaser of this journal, or of its parts, and the question is: to whom is this right of free performance given? On a reasonable reading of this document it cannot be said to be given to the world at large, but must be limited to bands and bandsmen.

The Court below referred to *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (1) and *Buck* v. *Debaum* (2), but those were both cases where there was a licence or authority to broadcast. It is true that in the *Performing Right Society's* case (1) there is a dictum of Romer L.J. (as he then was) to the effect that if some one is allowed to broadcast then there must be taken to be implied the permission to some one else to pick up the broadcast. That is what the dictum amounts to; but both the above cases depended on the preliminary licence to broadcast, and do

(1) [1934] 1 Ch. 121. (2) (1929) 40 Fed. Rep. (2nd Series) 734.

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not help in deciding whether, if a right to perform is given, that gives a right to a third party to broadcast the performance. Here one has to go a great deal further, and to say that a licence to play anywhere means a licence to play in front of a microphone, and that a licence to play in front of a microphone means an implied licence to some one else to broadcast. That, it is submitted, is an untenable proposition, because in broadcasting there is a new performance of an entirely different character. [Reference was also made to *Maythorne* v. *Palmer*. (1)]

R. F. Roxburgh K.C. and *Wilfrid Hunt* for the respondents. The point of the respondents' admission is that under the Copyright Act infringement does not consist merely in performance, but also in authorizing the performance. There are not two performances in public as a result of the transactions, but one performance in public, of which the performance by the band is an essential contribution. There was certainly no *public* performance by a band in the studio ; there may have been a public performance in a concert hall, and the Board may decide that it is necessary to distinguish between such performances. That difficulty will only arise, however, if the conclusion is reached that in this case there can be two performances for which the respondents are responsible. A band has not exercised its licence at all by performing in a studio, because it has not given a *public* performance. Are not the statements in the pamphlets in the nature of a consent to a band contributing to a performance which they are engaged to do in order that the music played by them should be broadcast ? There is no difference in principle between a concert syndicate who sell tickets and invite people to listen to a concert in a hall, and a Broadcasting Commission who tell the public that they can listen in and hear the music which the Commission has arranged to be performed. The words of the pamphlets are an express consent to the doing of what was done in this case. The words " we make one price cover both the music and the "performing rights thereof " must mean *all* the performing

(1) (1865) 11 Jurist (N. S.) 230.

rights. It would seem that the two rights—copyright and performing right—are treated as two quite separate rights of property, to be dealt with separately: Halsbury's Laws of England, 2nd ed., vol. 7, p. 543, para. 848; Copinger on The Law of Copyright, 7th ed., p. 57. If that be so, the inference is that no rights of public performance are conferred; yet if such rights are conferred, prima facie it means *all* performing rights, and the onus lies upon an owner to introduce some plain qualification if he is disposing of any particular performing right. If there is any limitation it is not one which excludes what was done in this case. [Reference was made to *Messager* v. *British Broadcasting Co.* (1)]

Maxwell Fyfe K.C. replied. The argument in *Buck* v. *Jewell-La Salle Realty Co.* (2) bears a striking resemblance to that of the respondents in the present case.

Feb. 22. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM. This is an appeal from a judgment of Nicholas J. in the Supreme Court of New South Wales in its equitable jurisdiction. By the judgment, which was delivered on December 10, 1937, the learned judge dismissed the action which was brought by the appellants against the respondents and was founded on alleged infringements of copyright in Australia during the years 1932 and 1933.

By s. 8 of the Australian Copyright Act, 1912 (No. 20 of 1912), it is provided that the British Copyright Act (the Copyright Act, 1911) should, subject to any modifications provided by the Australian Act, be in force in the Commonwealth, and should be deemed to have been in force therein as from July 1, 1912. So far as affects the action and this appeal no modifications are material. The appellants carry on in partnership a business in England under the name of Wright and Round as publishers of band music, and they were at the material times owners of the sole right of performing in public within the Commonwealth a large number of musical works arranged for performance by brass and military bands. They publish each year a pamphlet described as a Band

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(1) [1927] 2 K. B. 543, 551.

(2) (1931) 283 U. S. Rep. 191.

Journal, which contains a statement of the terms or prices for purchase of the music of their pieces, and long lists of these pieces and of the parts required for their performance by bands and soloists. It may be mentioned that some of the pieces are arrangements of well known operas and other works and songs, and others are described as being original compositions. The pamphlet or journal also contains certain statements or guarantees as to the performance of the pieces, which will be stated later. It will be found that this appeal depends on the meaning and effect of these statements.

The respondent is a corporation constituted under the Australian Broadcasting Commission Act, 1932, and is authorized by law to provide and broadcast throughout the Commonwealth from broadcasting stations, known as National Broadcasting Stations, adequate and comprehensive programmes, and to take in the interests of the community all such measures as in its opinion are conducive to the full development of suitable broadcasting programmes.

There is no dispute about the facts. The respondents during the years in question were in the habit of engaging bands to play some of the copyright works of the appellants in studios, or sometimes in other places, with a view to the broadcasting of the performances. The bands, or the members of the bands, had purchased the pieces on the terms and with the guarantees set out in the appellants' pamphlets or journals. The respondents always approved the programmes of the bands before the performances.

The actual broadcasts by the bands were effected in the manner now usual in such cases. There was a microphone placed in position to receive the sounds and to transmit them to modulating and amplifying equipment belonging to the respondents in their control room. Thence the sounds were carried by land line to the respondents' transmitting station where, after again passing through modulating and amplifying equipment, there was a transmission by electromagnetic waves of a specific wave-length which were picked up by receiving sets in different parts of the Commonwealth.

It was admitted by counsel for the respondents that

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there were performances in public of the works in question for which the respondents were responsible if in the circumstances of the case there was no consent by the appellants to such performances. The respondents, however, maintain that such consent was in fact given by the circulation to bands and band organizations and music sellers throughout the Commonwealth of the annual pamphlets above mentioned. The pamphlets, during the years in question, contained (with an alteration of date for the year 1933) the following statements :—

"Please note : All our music is Free for Public Performance.
"To the Bands of the British Empire.
"Once more it is our privilege to offer you yet another issue, "the 58th without a break of the world-famous Liverpool "Journal. All we said of the 1931 Journal has been proved "to be true by the record sales of it. Thousands of bands "have played it, and have thereby justified our assertion "that it would be found to be the goods. . . . ."

"The 1932 Journal will be found equal to any of its "predecessors. We have chosen it with the greatest care, "from an enormous stock of manuscript scores we have "selected a Journal which is all good, and balanced to meet "the needs of every band. . . . ."

> "All our subscribers should note especially that all our "music is 'Free for Public Performance' anywhere. See our "guarantees below, show them to your patrons, so that they "may rest assured that none of our publications will bring "them any trouble over 'performing fees.' We make ONE "price cover both the music and the performing rights "thereof, and the extent of our sales proves that bandsmen "appreciate the equity of our policy. . . . ."

"Relying on a continuance of your esteemed patronage and "soliciting the favour of early orders,

"We remain,
"Yours faithfully,
"WRIGHT AND ROUND."

"IMPORTANT GUARANTEES.

"We guarantee that every piece published in the L. J. can "be played anywhere, by anyone without fear that any "composer or society will pounce upon any Band for Per-"forming Fees.

"We have paid for the performing rights of every piece we "issue, and no Band will buy L. J. Music and discover later "that they must not play it at an engagement without paying "fees to someone else.

"We guarantee, also, to supply music (in accordance with "the terms of subscription) to the value of 3*l.* 12*s.* 6*d.* (20 parts) "for each subscription of 1*l.* 17*s.* 6*d.*

"You will see that Our Price includes not only the Printed "Music, but also Permission to Play it Anywhere, Without "Further Payment. This Fact is Important to your Band, "and to Every Bandsman Personally."

Before considering the meaning and effect of the statements and the guarantee it is desirable to make some general observations. Musical copyright under the Act of 1911 is of a special character. Apart from the right to prevent the multiplication of copies of the piece of music—with which we are not concerned here—it comprises " the sole right ". . . . to perform . . . . the work or any substantial part "thereof in public . . . ." and to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed . . . . and to authorize any of such acts (s. 1). " Per-"formance " is declared (s. 35) to mean " any acoustic "representation of a work." The copyright is deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright (s. 2). Nothing is said in the Act with regard to broadcasting, which is not surprising having regard to the facts that wireless signal communication was then in its infancy, and broadcasting of music (and of speech) as now practised was unknown.

It is, however, clear, and it is not in dispute, that the acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance is a performance (public or private) of the work within the meaning of the Copyright Act. It is nothing to the purpose that what is heard is the result of various scientific instruments and appliances at the transmitting end, the transformation back into electric impulses at the receiving end, and the receiver or loud speaker which finally converts the electric signals into sounds. The Act is concerned with the protection of authors, and is dealing with practical matters. The listeners at the reception end conceive themselves as listening to the musical piece as played in the distant studio, and they do not doubt that they are listening to a performance of that piece.

Here it is necessary to remember that the sole right of the owner of the musical work is to perform it *in public*, and that anyone may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcast performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place: *Performing Right Society, Ld.* v. *Hammond's Bradford Brewery Co.* (1) If there is merely a broadcast from the studio where the piece is performed in private, there is obviously no performance in public at all. A broadcast per se is not an *acoustic* representation of the work. If the broadcast is picked up only by listeners in private it might be difficult to establish that there is a public performance; for each performance would be separate, and each would be private; but it is not necessary to express an opinion on this point. It cannot be doubted that a broadcast to all and sundry listeners in such a case as we are dealing with will include hotels and other places of entertainment or refreshment who, if not forbidden, will perform the piece to a number of members of the public; and it is clear that such a performance will be a public performance within the meaning of the Copyright Act by the owners or occupiers of those places; for their actions in connection with the receivers which have been installed there, and which they control, have caused the public performances to take place.

(1) [1934] 1 Ch. 121.

Whether the studio performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud speaker and thus to perform the piece in public. The question as to the position of the broadcasters in such a case, so far as regards infringement, is answered by the language of s. 1, sub-s. 2, of the Act. It is sufficient to show that they have " authorized " the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. The respondents, it may be added, did not attempt to limit the general right of the owners of receiving sets to private performances of these pieces; it was probably impracticable so to do. The respondents have admitted, as already stated, that there were performances in public for which they were responsible unless they can rely on the consent or licence contained in the pamphlets above referred to. The terms of these documents must now be considered.

The learned trial judge has decided the question as to the true meaning of the pamphlets in favour of the respondents, holding that the language used in the pamphlets was a consent to the public performance of the works by the respondents. Their Lordships have arrived at a similar conclusion. It is to be noted in the first place that the right to perform a musical piece by means of a broadcast is a right comprised in " the sole right . . . . to perform . . . . "the work . . . . in public" conferred by s. 1, sub-s. 2, of the Act. (See also the First Schedule to the Act, where "performing right" has an equally wide meaning.) The appellants are now seeking to split this right into two for the purposes of construing their guarantee, namely, the exclusive right to perform to an assembled audience, and the exclusive right to perform by means of a broadcast. Yet the phrase " we have paid for the performing rights of every "piece we issue" makes no separation between these two rights. Nor do the words at the beginning of the extracts from the pamphlets above set out, "all our music is free for "public performance," make such a distinction. The sentences "all our subscribers should note especially that all our music "is 'free for public performance' anywhere" and "we "make one price cover both the music and the performing "rights thereof" enforce the argument that the appellants are not retaining for themselves any performing rights as against the persons who subscribe for or buy the musical pieces published by the appellants. Taken as a whole the extracts above set forth seem to their Lordships to guarantee complete freedom from trouble as to copyrights to bands, who having bought the music published by the appellants, play the musical works in public. As the learned judge remarked, the appellants "must have known that band "performances were frequently broadcast." If they desired to exclude such broadcasting—included as it is in the statutory "performing right"—it was for them to exclude it.

Their Lordships are therefore of opinion that the licence or consent given in the pamphlets included the broadcasting by bands with any necessary consequences of such broadcasting, such as the use of receivers by persons entitled to use them. It follows that the respondents were entitled to engage bands to do these permitted things, and have not committed a breach of the appellants' performing rights by "authorizing" the bands to do them.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed, with costs.

Solicitors for appellants: *Blundell, Baker & Co.*
Solicitors for respondents: *Routh, Stacey & Castle.*

[PRIVY COUNCIL.]

MAMUR AWQAF OF JAFFA . . . . APPELLANT;

AND

GOVERNMENT OF PALESTINE . . . RESPONDENT.

J. C.*
1940
Feb. 22.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Takhsisat waqf—Claim to tithe and registration fees—Nature of land—Limitation—Land (Settlement of Title) Ordinance, No. 9 *of* 1928*—Ottoman Land Code,* 1858, *art.* 20*—Construction.*

Art. 20 of the Ottoman Land Code of 1858, which provides (inter alia) [Fisher's translation] that "actions concerning land "of the kind that is possessed by title-deed the occupation of "which has continued without dispute for a period of ten years "shall not be maintainable," deals with conflicting claims to the tassaruf or possession of mirie land [State land], and is not so expressed as to apply to claims made on behalf of a takhsisat waqf against the Treasury to a share of tithe and registration fees. The language of art. 20, which must be read as a whole, cannot therefore be regarded as covering the claim of a waqf to its share of the State imposts.

Judgment of the Supreme Court of Palestine affirmed, but on a different ground.

APPEAL (No. 56 of 1938) from a judgment of the Supreme Court of Palestine in its appellate jurisdiction (April 22, 1937), affirming a judgment of the Land Court of Jaffa (October 19, 1933), which in turn had affirmed a judgment of the Settlement Officer, Jaffa Area (March 7, 1932).

In November, 1931, the appellant, Mamur Awqaf of Jaffa, representing the Supreme Moslem Council, which was the administrator of the waqf Khaski Sultani, claimed before the Settlement Officer, Jaffa Area, that the above-mentioned waqf should be entered on the "Schedule of Rights" in respect of certain lands in the villages of Yahudiya and Petach Tiqya as being entitled to a share in the tithes and land registry fees, and that the category of the said lands should be recorded as being waqf Khaski Sultani.

The facts and the relevant statutory provisions appear from the judgment of the Judical Committee.

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* *Present:* VISCOUNT MAUGHAM, LORD PORTER, and SIR GEORGE RANKIN.

The Supreme Court of Palestine in its appellate jurisdiction (Manning, Frumkin and Khaldi JJ.), affirming the decision of the Land Court of Jaffa, dismissed the appellant's claim on the ground of limitation having regard to the terms of art. 20 of the Ottoman Land Code, 1858.

1940. Jan. 16, 18, 19. *J. M. Gover K.C.* and *F. E. Skone James* for the appellant.

L. P. E. Pugh K.C. and *Kenelm Preedy* for the respondent.

Feb. 22. The judgment of their Lordships was delivered by SIR GEORGE RANKIN. By the Land (Settlement of Title) Ordinance, No. 9 of 1928, provision was made to effect a settlement of the rights in land in any area in Palestine, and for the registration thereof in a register of title. The settlement was to be based upon a survey after demarkation of boundaries, every claimant to land in a village within a settlement area being required to submit his claim to the settlement officer, who had to draw up a schedule of claims and to investigate all claims publicly. The settlement officer was given power to hear and determine conflicting claims, and was required to set forth the results of his investigation in a schedule of rights to be transmitted to the registrar together with a signed plan of the parcels comprised therein. After the publication of the schedule of claims no fresh entries were to be made in the existing land registers, but a new register was to be opened for each village, and the land was to be entered therein in accordance with the schedule of rights and plan transmitted by the settlement officer, and in accordance with his decisions in the case of rights shown in the schedule as disputed. The Ordinance provided (s. 43) that registration of land in the new register should invalidate any right conflicting with such registration; also (s. 44) that no disposition of land registered in the new register, other than a lease for not more than three years, and no transmission of land on death, should be valid until registered.

The law to be applied by the settlement officer in the decision of disputes is defined by sub-s. 3 of s. 10 :—

"(3.) A settlement officer shall apply the land law in force "at the date of the hearing of the action:

"Provided that he shall have regard to equitable as well "as legal rights to land and shall not be bound by any rule "of the Ottoman Law or by any enactment issued by the "British Military Administration prohibiting the courts from "hearing actions based on unregistered documents or by the "rules of evidence contained in the Ottoman Code of Civil "Procedure or the Ottoman Civil Code."

This mention of equitable and legal rights is to be read with reference to the provisions of art. 46 of the Palestine Order in Council, 1922, which, as observed by Lord Atkin, delivering the judgment of this Board (October 11, 1935), in *Sheikh Suleiman Iaji Faruqi* v. *Michel Habib Aijub* (1) "enrich the jurisdiction of the Courts in Palestine with all "the forms and procedure and all the different remedies "that are granted in England in common law and equity, "and also enrich their jurisdiction with the principles of "equity . . . ."

In November, 1931, the appellant, who is Mamur Awqaf (registrar of waqfs) at Jaffa, brought before the settlement officer for the Jaffa area a claim in respect of certain land in two villages, Yahudiya and Petach Tiqya. The claim as regards Yahudiya was numbered Case No. 210/31, and the Petach Tiqya claim was Case 189/31, but the two cases were joined and treated as identical. The claim of the appellant was that the lands in question (certain numbered " blocks " or units of survey and registration) should be entered in the schedule of rights, for the purposes of the new register under Ordinance No. 9 of 1928 above-mentioned, as land in respect of which the waqf Khaski Sultani was entitled to the whole of the tithe and half of the land registry fees. The settlement officer (March 7, 1932), and, on appeal from him, the Land Court (October 19, 1933), and the Supreme Court (April 22, 1937), have dismissed the appellant's claim on the ground of limitation having regard to art. 20 of the Ottoman Land Code of 1858.

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(1) Unreported (P. C. Appeal No. 1 of 1935).

This Code was originally applicable not to Palestine only, but to the old Ottoman Empire generally. By its first six articles it defines and distinguishes five kinds of land which range from " mulk "—that which is in the full ownership of private persons—to " mevat "—that which is waste, in the sense of being used by no one. Between these extremes lie three classes. First, " mirie " or State land : this is land of which the ownership (raqaba) is in the Treasury, but the enjoyment or possession (tassaruf) is granted to an occupier whose interest is heritable and (with permission) transferable. The interest of this occupier is in some respects analogous to a perpetual leasehold, and the object of the grant to him is, in general, that the land may be cultivated and that the State may derive a tithe therefrom. This interest is described in art. 20 of the Land Code by the Turkish word " tapoulé," which characterizes it as of the kind that is held by tapou : *Ibrahim Mehmet* v. *Hadji Panyioti Kosmo*. (1) A fee, called the tapou fee, was payable to the State upon the grant of the right, and upon registration in the tapou register a title deed was given in respect of it.

Another class of land is " mevqufé " or dedicated land : which may be either mulk which has been dedicated by the full owner, or State land which has been dedicated by the Sultan or others with his sanction. With reference to such State land it is explained in art. 4 of the Land Code (2) : "The dedication of this land consists in the fact that some of "the State imposts, such as the tithe and other taxes on the "land . . . . have been appropriated by the Government for "the benefit of some object. Mevqufé land of this kind is not "true waqf. Most of the mevqufé land in the Ottoman Empire "is of this kind. The legal ownership of land which has been "so dedicated (of the takhsisat category) belongs as in the "case of purely State land to the Treasury, and the provisions "and enactments hereinafter contained apply to it in their "entirety. Provided that, whereas in the case of purely State "land the fees for transfer, succession and the price for "acquiring vacant land are paid into the Public Treasury, for

(1) (1884) 1 Cyprus L. R. 12.

(2) Fisher's Ottoman Land Laws.

"this kind of mevqufé land such fees shall be paid to the waqf "concerned."

Yet another class of land is "metrouke"—that is, land devoted to use by the public, such as public roads. This class of land is the subject-matter of the second book of the Land Code which, in art. 102, contains a provision that no period of limitation applies to actions relating to such land (cf. art. 1675 of the Mejelle).

The claim of the appellant is that the lands in question are mevqufé land in the sense described by art. 4. The only basis of the claim, and the only evidence of it which has been put forward, lie in the fact that in the tapou register between the fiscal years 1309 and 1326 (A.D. 1893–1910) the entries in respect of these lands contain in a column headed "reference to waqf" the name "waqf Khaski Sultani," with or without the addition of the word "mazbuta." In or about 1893 certain lands in Yahudiya came to be held by one Isidore Brown, a French subject, and in 1905 they were entered for convenience as belonging to another village called Mulabes or Petach Tiqya: in 1907 Isidore Brown died, and the lands were entered as belonging to his heirs in various shares. The entries made on each of these occasions contain a reference to the waqf Khaski Sultani. In 1910, when the lands were transferred to one Henry Frank Alphonso, a French subject, they were entered in the tapou register as mirie land, without mention of the waqf Khaski Sultani. From that date, 1910 until 1931, they stood in the register as mirie lands. The entries of 1910 appear to be certified by members of the waqf administration, and it is not open to dispute that they came at the time to their knowledge. It was suggested by the appellant that the change in the form of entry was due to inadvertence, and that the waqf had received moneys from the lands now in question after 1910 and until "the occupation," but no evidence was given to that effect, and the Courts in Palestine have had little difficulty in holding that no such payments were made after 1910. No evidence was adduced to prove the nature and character of the waqf Khaski Sultani, the properties dedicated

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to it or acquired by it, or the sums received, if any, from the lands now in question before 1910. No tapou title deed was produced to throw light upon any of the entries in the register.

It appears that a waqf mazbuta is one which was administered directly by the Ministry of Waqf. It was suggested in argument by learned counsel for the respondent that a waqf of the takhsisat kind could not be described as a mazbuta waqf, but this has not been shown to their Lordships' satisfaction. It is somewhat disconcerting, however, to find that the appellant, whose case consists entirely in reliance upon the entries in the tapou register from 1309 to 1326, began before the settlement officer by denying that the lands in question were waqf of the takhsisat kind, and claiming that they were true waqf (sahih waqf)—that is, the subject of dedication by a dedicator entitled to the full ownership as of mulk.

The first question for decision is whether the appellant's claim is barred by art. 20 of the Land Code. The original is in Turkish, and the translations hereunder given are taken from Fisher's Ottoman Land Laws (1919), Young's Corps de Droit Ottoman (1906), and Ongley's Ottoman Land Code, ed. Miller (1892).

"Article 20. (Fisher.)

"In the absence of a valid excuse according to the Sacred "Law, duly proved, such as minority, unsoundness of mind, "duress, or absence on a journey (muddet-i-sefer) actions "concerning land of the kind that is possessed by title-deed "the occupation of which has continued without dispute for "a period of ten years shall not be maintainable. The "period of ten years begins to run from the time when the "excuses above-mentioned have ceased to exist. Provided "that if the defendant admits and confesses that he has "arbitrarily (fouzouli) taken possession of and cultivated the "land no account is taken of the lapse of time and possession "and the land is given back to its proper possessor.

"Article 20. (Young.)

"Lorsqu'une personne ayant droit à la possession d'une "terre miri l'aura laissé occuper par une autre pendant dix "ans sans la revendiquer en justice, et sans pouvoir invoquer "aucune excuse valable telle que la violence exercée par "l'occupant, la minorité, la démence, l'absence pour cause de "voyage, les procès tendant à la restitution de la possession "de cette terre ne pourront pas être accueillis. Le délai de "dix ans court à partir du moment où les excuses ci-dessus "auraient cessé d'exister. Mais, si le défendeur reconnaît "qu'il a pris possession de la terre et qu'il l'a cultivée sans "droit (fouzouli), il n'est pas tenu compte due délai qui s'est "écoulé et la terre est remise au légitime possesseur."

"ARTICLE 20. (Ongley.)

"Actions concerning Tapu land which has been held for "ten years without opposition will not be heard without one "of the legal disabilities, such as minority, madness, force, "and being absent in a distant country, having been proved "according to the Sheri. They will be heard up to ten years "from the date of the cessation of such valid excuses, and "after that time has passed they will not be heard. But "if the defendant admits having unlawfully seised and "cultivated the land, attention will not be paid to the lapse "of time and possession, and the land will be taken and given "to the owner."

The settlement officer arrived at the conclusion that "there "exist no definite provisions of law or judicial precedents "defining the period of prescription in regard to claims to "revenue by a takhsis waqf." But he thought that "in the "absence of any better authority" it was open to him to apply the period of ten years prescribed by arts. 20 and 78, which regulate prescription as regards possession of mirie land. The Land Court would appear to have accepted this view. The Supreme Court held that the provisions of art. 20 covered the present claim; saying "it is to be noted that "the article does not deal with an action for the possession "of land, but with an action relating to land so possessed "(*s.c.* by tapou deed)."

As a matter of construction, their Lordships cannot but hold, in accordance with the appellant's contention, that art. 20 deals with conflicting claims to the tassaruf or possession of mirie land, and that it is not so expressed as to apply to claims made on behalf of a takhsisat waqf against the Treasury to a share of tithe and registration fees. The phrase "actions "concerning land of the kind that is possessed by title-deed" must be taken in its context. Whichever of the translations above set out be preferred, it is required by the structure of art. 20 that it be read as a whole. The article finds place in the first chapter of the first book, namely, the chapter headed "Concerning the nature of possession." It is one of a set of provisions intended to apply to cases in which land has been taken and cultivated by a person other than the holder by tapou title deed. The reference to valid excuses and the examples of disability given in the article point to the same conclusion. It is difficult to hold a confident opinion upon the question whether from the standpoint of 1858 the suggestion of a ten year limitation could be regarded as reasonable or proper for the purpose of bringing to an end a dedication of the takhsisat kind. The right in question, though concerned with mirie land, is very different from the right of an occupier of land. In any case, their Lordships cannot regard the language of art. 20 as covering the claim of a waqf to its share of the State imposts, and they have not been shown any basis in the law of Palestine for the view that the settlement officer in the absence of any enactment applicable to the case had a discretion to apply a ten years' period of limitation.

It is manifest, however, that the claim put forward in 1931 was a stale claim, and one which should have been made only upon the basis of carefully ascertained facts laid fully before the Courts so as to show the true nature and character of the dedication alleged and the objects thereof; the facts as to the abandonment of the claim of waqf by the representatives of the waqf administration; and the facts as to receipt or non-receipt of income both before and after 1910. Merely to file the entries in the tapou register is not to prove that the entries for the last twenty-one years are incorrect because they differ from previous entries. It would seem from the facts above stated to be quite untrue that the change was made by inadvertence, or that the consequences of the change were not immediately apparent. The settlement officer is not to be asked to embark upon speculation as to the cause of the change in the absence of evidence produced in support of a definite case. The terms of the original endowment of the waqf Khaski Sultani, or the conditions of dedication of the land now in question, may or may not have a bearing upon the conduct of the waqf's representatives in 1910. Their Lordships are not disposed to place reliance on the suggestion made by the Land Court to explain the entry made in 1910—a suggestion of which the probability is difficult to discover—that it is accounted for by new arrangements taking effect between the Ministry of Waqfs and the Ministry of Finance. After twenty-one years it is not for the Government to explain and justify their claim to the State imposts, but for the appellant to establish the rights of the waqf therein. He has done no more than give proof of the entries in the tapou register, and these for the last twenty-one years are against him. Their Lordships are of opinion that the latest tapou register is competent evidence as to the character of the land in question, and that the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect; otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law. The appellant has adduced no evidence of any right to have these lands recorded as mevqufé in the schedule of rights which was in course of preparation for the purposes of the new register.

Sect. 64 of Ordinance 9 of 1928 gives to the Land Court on appeal from the settlement officer a discretion to rehear the evidence or to hear fresh evidence, and their Lordships have considered whether it would be right that this case should be remitted to the Land Court with or without a direction that the appellant should have an opportunity in that Court to adduce evidence afresh in support of his case. They think, however, that the claim is a stale claim, insufficiently considered, and put forward with the utmost economy of information, and that as the evidence adduced

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does not amount to prima facie proof of the title which has been put in issue the appellant's claim ought now to be dismissed. Nothing is here said as to the effect in such a case as the present of the provisions of arts. 1660 or 1661 of the Mejelle; but their Lordships think it plain that arts. 78 and 102 of the Land Code have no application to the present case, the former being directed solely to the rights of a cultivator against the State, and the latter to land which is metrouke in the sense already explained.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondent's costs.

Solicitors for appellant: *Stoneham & Sons.*
Solicitors for respondent: *Burchells.*

Referred to. A.-G. for Saskatchewan v. A.-G. for Canada. [1949] A. C. 110

[PRIVY COUNCIL.]

J. C.*
1940
Mar. 4.

BOARD OF TRUSTEES OF THE LETHBRIDGE NORTHERN IRRIGATION DISTRICT and Another . . . . APPELLANTS;

AND

INDEPENDENT ORDER OF FORESTERS RESPONDENT.

ATTORNEY-GENERAL FOR CANADA . . INTERVENER.

THE KING . . . . APPELLANT;

AND

INDEPENDENT ORDER OF FORESTERS RESPONDENT.

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada—Alberta—Legislation reducing interest on securities issued or guaranteed by the Province—In pith and substance "Interest" legislation—Ultra vires of Provincial Legislature—Provincially Guaranteed Securities Proceedings Act, S. A., 1937, *c.* 11—*Provincial Guaranteed Securities Interest Act, S. A.*, 1937, *c.* 12—*Provincial Securities Interest Act, S. A.*, 1937, *c.* 13—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (19.); *s.* 92 (8.), (13.), (16.).

The Provincial Guaranteed Securities Interest Act, c. 12 of the 1937 Statutes of Alberta, which purported to reduce by one-half the interest on certain securities guaranteed by the Province of Alberta, and the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, which purported to reduce the interest payable on securities issued by the Province to, in general, half the agreed rates, were in pith and substance Acts dealing with "interest" within the meaning of head 19 of s. 91 of the British North America Act, 1867, a subject-matter within the exclusive legislative competence of the Dominion Parliament, and the Acts were therefore ultra vires of the Provincial Legislature.

Ladore v. *Bennett* [1939] A. C. 468 referred to.

Day v. *Victoria* (*City*) [1938] 3 W. W. R. 161 approved.

The Provincially Guaranteed Securities Proceedings Act, c. 11 of the Statutes of Alberta, 1937, which purported to prohibit

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT SANKEY, VISCOUNT MAUGHAM, LORD ROCHE, and LORD PORTER.

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any proceedings in Alberta for recovering directly or indirectly money due in respect of any guaranteed security without the consent of the Lieutenant-Governor in Council, was in fact, and so far as it applied to the subject-matter of this appeal, designed to effect the same purpose as the Provincial Guaranteed Securities Interest Act, c. 12 of 1937, namely, to reduce the rate of interest on the guaranteed securities, and must fall with the latter Act; it was an attempt to do by indirect means something which the Provincial Parliament could not do.

Dictum in *Madden* v. *Nelson and Fort Sheppard Ry.* [1899] A. C. 626, at p. 627, referred to.

Judgments of the Supreme Court of Alberta (Appellate Division) [1938] 3 D. L. R. 89; [1939] 2 D. L. R. 671, affirmed.

Appeals (No. 107 of 1938 and No. 45 of 1939), heard together, the first from a judgment of the Supreme Court of Alberta (Appellate Division) (May 23, 1938), affirming a judgment of Ewing J. (October 29, 1937); the second from a judgment of the Supreme Court of Alberta (Appellate Division) (April 5, 1939), affirming a judgment of Shepherd J. (February 11, 1939).

The appeals raised the question whether the Provincially Guaranteed Securities Proceedings Act, in so far as it related to the subject-matter of the present appeal, the Provincial Guaranteed Securities Interest Act, and the Provincial Securities Interest Act, being respectively cc. 11, 12 and 13 of the Statutes of Alberta, 1937, were intra vires of the Provincial Legislature. The Provincial Guaranteed Securities Interest Act, c. 12 of 1937, by s. 3, purported to reduce the rate of interest payable on any security guaranteed by the Province of Alberta "notwithstanding any stipulation or "agreement as to the rate of interest payable" in respect of the security, to, for example, three per cent. in cases where the guaranteed security bore six per cent. interest. Sect. 3 of the Provincially Guaranteed Securities Proceedings Act, c. 11 of 1937, so far as it applied to the first appeal, purported to prohibit any action or proceedings of any kind for the recovery of any money payable "in respect of any guaranteed "security . . . . without the consent of the Lieutenant-"Governor in Council." The Provincial Securities Interest Act, c. 13 of 1937, also purported to provide for a reduction of

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the rate of interest payable in respect of any security issued by the Province, the new rates, in general, being half the agreed rates.

In the first appeal the respondent, the Independent Order of Foresters, was the holder of a number of debentures, dated May 21, 1921, each for the principal sum of $1000, issued by the appellant, the Board of Trustees of the Lethbridge Northern Irrigation District, and guaranteed by the Province of Alberta. The debentures bore interest at the rate of six per cent. per annum. On May 11, 1937, the respondent presented the appropriate coupons for payment at the Imperial Bank of Canada in Toronto, but the Bank, acting on the instructions of the Government of the Province of Alberta, refused payment of the full amount of the interest. The respondent thereupon began the action out of which the first appeal arose to recover the interest due on the debentures. The appellant, in answer to the claim, relied on the Acts, cc. 11 and 12 of 1937.

In the second appeal the respondent owned a number of debentures to the amount of $373,000, lawfully issued by the Province of Alberta. The debentures, which were issued at different dates, bore rates of interest varying according to the conditions of the several debentures. The respondent, on presenting interest coupons from time to time, had been refused payment of interest at the agreed rates, and began the proceedings out of which the second appeal arose by way of petition claiming that the Act, c. 13 of 1937, was ultra vires the Alberta Legislature.

The facts and the relevant statutory provisions are stated more fully in the judgment of the Judicial Committee.

In the first case the trial judge (Ewing J.) declared that c. 12, and c. 11 in so far as it related to the subject-matter of the action, were ultra vires of the Legislature of the Province, and his judgment was affirmed by the Appellate Division (Harvey C.J.A., Lunney, McGillivray, JJ.A., and Shepherd J., Ford J.A. dissenting). The appeal is reported at [1938] 3 D. L. R. 89.

In the second case the trial judge (Shepherd J.) held that

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c. 13 of the 1937 statutes was ultra vires of the Provincial Legislature, and the Appellate Division (Ford J.A., Tweedie and Howson JJ.) affirmed his decision. The appeal is reported at [1939] 2 D. L. R. 671.

1939. Dec. 11, 12, 13, 14. *D. N. Pritt K.C.* and *W. S. Gray K.C.* for the appellants in both appeals. It is suggested by the respondents, and has been held by the Courts below, that by reducing the interest the Province is breaking into a field of legislation reserved for the Dominion under head 19 of s. 91 of the British North America Act, 1867, and that therefore the Provincial legislation in question is ultra vires. [Reference was made to the British North America Act, 1867, ss. 91 and 92, and to cc. 11, 12 and 13 of the Statutes of Alberta, 1937.] Whenever the Court is faced with legislation which seems to touch or infringe upon some parts of both ss. 91 and 92 the Court should approach the matter as follows: First, it must examine the legislation and arrive at a conclusion under what head of either section it really falls in pith and substance. In pith and substance is the present legislation about "property and civil rights in the Province," and therefore within legislative competence of the Province under head 13 of s. 92, or is it in pith and substance legislation about "interest," within the meaning of head 19 of s. 91? Secondly, if in pith and substance this legislation does come under some head of s. 91—in the present case, head 19—that is the end of the matter, and the statutes are invalid. Thirdly, if in pith and substance the legislation falls under some head of s. 92, then the statutes will be perfectly good notwithstanding that they in fact also impinge on matters falling within s. 91, subject to a very important qualification to be found in the fourth and next proposition, namely, that if the Provincial legislation thus prima facie valid is found to be in actual conflict with legislation of the Dominion which deals in pith and substance with a head under s. 91, and is therefore valid, then the Provincial legislation falls after all, wherever the conflict arises and irrespective of time. [In support of the above four propositions reference was made to *Citizens' Insurance*

Company of Canada v. *Parsons* (1); *Hodge* v. *The Queen* (2); *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (3); *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (4); *Attorney-General for Ontario* v. *Attorney-General for Canada* (5); *John Deere Plow Co., Ld.* v. *Wharton* (6); *Canadian Pacific Wine Co.* v. *Tuley* (7); *Attorney-General for Ontario* v. *Reciprocal Insurers* (8); *Attorney-General for Canada* v. *Attorney-General for British Columbia* (9); *In re Insurance Act of Canada* (10); *Rex* v. *Arcadia Coal Co., Ld.* (11); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (12); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (13); and *Shannon* v. *Lower Mainland Dairy Products Board.* (14)

The Provincial Guaranteed Securities Interest Act, c. 12 of 1937, must, it is submitted, be said to come under head 8 (Municipal Institutions in the Province) or head 13 (Property and Civil rights in the Province) of s. 92. The real question is whether the legislation is deprived of the privilege of being classed as in respect of "property and civil rights" by being overridden by the other description of "interest." It is further said against the appellants that even if it is "property and "civil rights," it is not a right within the Province. To form an opinion whether c. 12 is in pith and substance legislation relating to "interest" under head 19 of s. 91, the Board will have to determine the exact scope of head 19 and of c. 12. It is contended that head 19 is designed to commit to the Dominion the right to legislate about "interest" only in a matter of general legislation of wide scope, and that it cannot be construed so as to affect rates of interest fixed in relation to purely Provincial contracts and obligations. To hold that head 19 gives the Dominion the sole right to legislate about "interest" and the public debt of a Province, or a debt guaranteed by a Province, would be to say something which is wholly inconsistent with the ordinary conception of Provincial sovereignty in matters which are essentially Provincial. Also, if the construction which has been adopted were allowed to prevail it would indeed invalidate a great deal of Provincial legislation on which no doubt has hitherto been thrown. If, however, head 19 is to be more restricted, then the true position is that c. 12 is legislation as to particular contracts within the head of "property and civil rights," that it does not in pith and substance relate to "interest," but is in respect of contracts laying down a condition of borrowing money.

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(1) (1881) 7 App. Cas. 96.
(2) (1883) 9 App. Cas. 117.
(3) [1894] A. C. 189.
(4) [1907] A. C. 65.
(5) [1912] A. C. 571.
(6) [1915] A. C. 330.
(7) [1921] 2 A. C. 417.
(8) [1924] A. C. 328.
(9) [1930] A. C. 111.
(10) [1932] A. C. 41.
(11) [1932] 1 W. W. R. 771.
(12) [1937] A. C. 368.
(13) [1937] A. C. 377.
(14) [1938] A. C. 708.

If c. 12 be legislation dealing in pith and substance with "property and civil rights" it must then be considered whether it conflicts with s. 2 of the Dominion Interest Act, R. S. C., c. 102, which provides for freedom of contract in relation to interest. It is submitted, first, that s. 2 is ultra vires if it be construed so as to make it impossible for the Legislature of Alberta in respect of an Alberta contract to say that the agreed rate of interest on that contract shall not be collected, but only something less. Secondly, it is enabling legislation, enabling persons to make any agreement they like.

If the legislation is in respect of "property and civil rights," it is quite plainly an Alberta matter. In the Lethbridge appeal there was a loan by the Board of Trustees of an Irrigation District within the Province, borrowing money with a view to irrigating a section of the Province; the Board is set up by a Provincial Statute, and the Board's obligations are guaranteed by the taxpayers of the Province. The debtor is resident in Alberta, and the proper law of the contract was the law of Alberta. The elements against it being "property and civil rights in the Province" are these: it might be said that these being bearer bonds they must be treated as being within the jurisdiction where they are from time to time physically present; or secondly, where they are payable. These are payable and can be presented to agents—bankers—in three Provinces and one Foreign country. The true position in Alberta is that there is not a single effective

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element in the matter to make this a civil right outside the Province of Alberta.

The only other submission about c. 12, apart from c. 11, is whether this legislation about the Irrigation Board can be said to be legislation about "municipal institutions in the "Province" within the meaning of head 8 of s. 92. It will depend entirely upon the view this Board take of "municipality"; if confined to pure Local Government Boards carrying out functions of government there would be a difficulty in the way of the appellants. On the other hand, if this Board regard "municipal" as covering many things that would be done by a Local Government Board, and that an institution carrying them out ought to be regarded as municipal, then the Board may perhaps be more with the appellants. It is submitted that *Ladore* v. *Bennett* (1) goes a long way to show that the appellant Board should be classed under "municipal institutions." There appears to be no authority as to what exactly is municipal; if it be a question of fact and degree the appellant Board has many features to be found in municipalities. A number of sections of The Irrigation Districts Act, R. S. A., 1922, c. 114, suggest that the institution is of a municipal character.

On the question of the generality of the word "interest" in head 19, reference was made to *Ladore* v. *Bennett* (1) and to *Lynch* v. *The Canadian N. W. Land Co.* (2); the latter case shows that "interest" has a relatively limited construction, and that the generality of head 19 is not to be carried too far. [Reference was also made to *Day* v. *Victoria* (*City*). (3)] Any Act which scales down the interest on a particular class of debts is not one relating to "interest"; no doubt it affects some interest, but it is a statute relating to certain contracts which the Legislature think ought to be made less onerous to one party and less advantageous to the other.

The next point is that if "interest" in head 19 of s. 91 be construed as the respondents suggest, such a construction would

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(1) [1939] A. C. 468, 482.
(2) (1891) 19 S. C. R. (Can.) 204, 212–14, 224–5.
(3) [1938] 3 W. W. R. 161, 177.

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appear to invalidate a number of sections in such statutes as Judicature Acts, Partnership Acts and Limitation Acts, which have always in part seemed to deal with interest: R. S. O., 1937, c. 100, ss. 33, 34 and 35; R. S. A., c. 155, s. 26; and R. S. O., 1937, c. 243. There are two authorities which treat as perfectly valid Ontario Provincial legislation relating to interest: *Toronto Railway* v. *Toronto Corporation* (1); *Consolidated Distilleries, Ld., and W. J. Hume* v. *The King* (2). [Reference was also made to The Debt Adjustment Act of Alberta, 1937, c. 9; The Limitation of Actions Act of Alberta, 1938, c. 28, s. 3, sub-s. 1 (*f*); and to *Allen* v. *Trusts and Guarantee Co., Ld. (Poponoff Estate)*.(3)] *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Canada* (4) shows that legislation of the present type is in relation to "property "and civil rights"; see also *Day* v. *Victoria (City)* (5); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (6); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (7); and *Independent Order of Foresters* v. *Board of Trustees of Lethbridge Northern Irrigation District.* (8) Remembering that the head "property and civil rights in the "Province" has been treated fairly widely by this Board and in the Courts in Canada, and remembering, too, that if it is not so treated it becomes almost impossible for a Province to legislate upon any matter of Provincial importance, the Courts, if they are going to be very strict about the Province putting their hand across the Provincial boundary line, are going to make it practically impossible for the Provinces to deal with their economical development. Nothing can be more essentially Provincial than in the one case a debt of the Province, and in the other the debts guaranteed by the Province; what the Board is really faced with, therefore, is a group of civil rights, and the only elements which are to be found without the Province are that many people outside the Province hold the securities, and the agents who make the payments may be outside the Province. Two elements in considering the location of these civil rights are (*a*) what is the proper law of the contract; and (*b*) can you be sued outside the Province in such a way as to bind you within the Province on these obligations? If the contracts are not governed by the law of Alberta they have to be governed by four or five different jurisdictions. The real solid location of all these debentures is where the debtor resides: *Mount Albert Borough Council* v. *Australian Temperance and General Mutual Life Assurance Society* (1); *Lynch* v. *The Canada N. W. Land Co.*(2); and *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (3) With regard to the question of enforcement, if a judgment were obtained by default against the appellants in another Province, and no property was found there, and thereupon the respondent repairs to Alberta with that judgment, the appellants would not be bound there by that judgment as a judgment: Dicey's Conflict of Laws, 5th ed., p. 991, Note 29. It would be sufficient for the respondent to say that this is "property and civil rights within the Province," and it would not matter if it is also property without the Province: *Royal Bank of Canada* v. *The King*. (4)

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(1) [1906] A. C. 117, 121.
(2) [1932] S. C. R. (Can.) 419.
(3) [1937] 2 W. W. R. 257.
(4) [1937] 2 W. W. R. 353.
(5) [1938] 3 W. W. R. 161, 185.
(6) [1937] A. C. 391.
(7) [1929] A. C. 260, 268.
(8) [1937] 2 D. L. R. 109.

If the argument on c. 12 prevail, then c. 11 need not be considered. If it does become necessary to adjudicate on it, the Board are faced with this problem: Can the Legislature of a Province which has entrusted wholly to its care "the "administration of justice in the Province," including "procedure in civil matters" in the Courts (head 14 of s. 92), have control over the proceedings in its Courts? and the appellants seek to say that just as by legislation the Province can impose limitation and other conditions that are reasonable on the litigious activities of their citizens, so, if anyone wishes to bring any proceedings in relation to these guaranteed securities he must apply to the Government, that is, the Lieutenant-Governor in Council, for consent to bring the action. Chapter 11 does not say a word about interest; it merely imposes a bar or a stop of a known kind on a particular class of litigation:

(1) [1938] A. C. 224, 244.

(2) (1891) 19 S. C. R. (Can.) 204, 217.

(3) [1920] A. C. 184.

(4) [1913] A. C. 283, 293, 297.

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Ottawa Valley Power Co. v. *Attorney-General for Ontario.* (1) On the question whether motive may be gone into, see Beal's Cardinal Rules of Legal Interpretation, 3rd ed., pp. 315, 417; *City of Fredericton* v. *The Queen* (2); and *Re Alberta Legislation.* (3)

With regard to the Provincial Securities Interest Act, c. 13 of 1937, the subject-matter of the second appeal, every argument that has been adduced to support c. 12 also supports c. 13, except that dealing with "municipal institutions." It is submitted that if the position is reached where the question of the conflict between the Interest Act and c. 13 has to be faced, the Board are entitled to say that the Crown is not bound by the Interest Act: *In re Silver Brothers, Ld.* (4) Further, it is submitted that the appellants can succeed in the second appeal on c. 13 by claiming to come under head 3 of s. 92, "the borrowing of money on the sole credit of the "Province," and that c. 13 is in pith and substance legislation in that sense, and not in respect of "interest"; a more specific power given in s. 92 can get more force of operation than a general power in s. 91: *Great West Saddlery Co.* v. *The King* (5); *Dominion Building Corporation* v. *The King.* (6)

G. H. Steer K.C., *Frank Gahan* and *R. Bigelow* for the respondents in both appeals, were not required to deal with the question of "interest" under head 19 of s. 91, but only with cc. 11 and 13 of the 1937 Statutes of Alberta. It is submitted that c. 13, as well as c. 12, is "interest" legislation. The principle is that if a matter comes in pith and substance within a head of s. 91—and it is contended that cc. 12 and 13 do come within head 19—it cannot possibly come under any head of s. 92—"property and civil rights," "municipal "institutions," or "borrowing money on the sole credit of "the Province"—and the fact that it might in some aspects be regarded as coming within s. 92 makes no difference: *Union Colliery Company of British Columbia* v. *Bryden.* (7)

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(1) [1936] 4 D. L. R. 594.

(2) (1880) 3 S. C. R. (Can.) 505, 532.

(3) [1938] 2 D. L. R. 81; [1939] A. C. 117, 130.

(4) [1932] A. C. 514, 521.

(5) [1921] 2 A. C. 91, 116.

(6) [1933] A. C. 533, 548–9.

(7) [1899] A. C. 580, 587.

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Further, if Provincial legislation is in conflict with valid Federal legislation, whether that Federal legislation is valid because it comes in pith and substance within a head of s. 91, or because it is necessarily incidental to matters coming within s. 91, then even that necessarily incidental legislation coming into conflict with Provincial legislation must prevail: *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1); *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers* (3); and *Attorney-General for Alberta* v. *Attorney-General for Canada.* (4) If c. 11 is examined in the light of the above propositions it is submitted that it is "interest" legislation just as clearly as cc. 12 or 13, because it is inseparably connected with c. 12. The only application which c. 11 can have is to a guaranteed security, defined in c. 11, and defined in exactly the same way in c. 12. The object and purpose of c. 11 is to give full effect to c. 12, by precluding a person, who feels that c. 12 does not stand in his way, from exercising his fundamental right to ask the Court to determine his rights under s. 12.

Further, if c. 11 is not "interest" legislation, it is a colourable device to prevent a person obtaining the interest to which he is entitled by virtue of the Interest Act of Canada. That sort of colourable device will not be allowed to prevail: *Madden* v. *Nelson and Fort Sheppard Ry.* (5) It is impossible for a Provincial Legislature to deny access to the Courts to a subject for the purpose of determining such questions as are involved in this appeal.

With regard to head 3 of s. 92—"borrowing on the sole "credit of the Province"—it is submitted that the British North America Act has authorized the Province of Alberta to make a contract with respect to the borrowing of money, and that once that contract has been made it is in no different category from any other contract; that the Crown is bound by its contract, and that whatever rights a private citizen

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(1) [1894] A. C. 189, 200.
(2) [1930] A. C. 111, 118.
(3) [1924] A. C. 328, 336–341.
(4) [1939] A. C. 117, 128–131.
(5) [1899] A. C. 626, 627–8.

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would have in respect of the limitation or repudiation of his contract the Crown would have, and no more. Once the Province has entered into a contract with the lender, head 3 of s. 92 has fulfilled its full purpose, and gives no further power to the Provincial Legislature. Once that contract has been made it becomes "property and civil rights," and it is either within or without the Province. If it is within the Province the Province has jurisdiction over it; if it is out of the Province it has no jurisdiction. The Province has no jurisdiction in this case because both the property that is created by these bonds and the civil right of enforcing the bonds in question here are outside the Province of Alberta. There is no question of severability: *Attorney-General* v. *Bouwens* (1); *Ottawa Valley Power Co.* v. *Attorney-General for Ontario.* (2) There is no difficulty in respect of a series of bonds with regard to their situs; the bonds in suit have a situs in the Province of Ontario, and that being so, the Province of Alberta has no jurisdiction over them because of the limited jurisdiction in s. 92 in respect of property and civil rights "within" the Province. The present case is stronger than *Royal Bank of Canada* v. *The King.* (3) [Reference was also made to Canada's Federal System, by Lefroy, pp. 506–9.] The power to enact legislation with respect to Provincial borrowing does not give any rights whatever to the Province to legislate with regard to a debt which has been created by this borrowing; that debt is created by an ordinary contract, and that contract must be controlled by the ordinary law, subject to any rights of the Crown that may be involved.

The question whether the Interest Act of Canada applies to the Crown in the right of the Province of Alberta is of no importance here if the Board come to the conclusion that c. 13 is "interest" legislation. The English rule is that the Crown shall not be bound by a statute unless named in it. The situation in Canada is quite different, because the whole question is controlled by the Interpretation Act, R. S. C., 1927, c. 1, s. 16: there has got to be a right of the Crown

(1) (1838) 4 M. & W. 171.
(2) [1936] 4 D. L. R. 594.
(3) [1913] A. C. 283.

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affected, and to the detriment of the Crown: *In re Silver Brothers, Ld.* (1) It is submitted that s. 2 of the Interest Act simply confers a benefit on the Crown in the sense that the Crown can make a bargain in respect of interest in exactly the same way as any subject can enter into such an obligation; it has no effect whatever on any right of the Crown. It was decided in *Dominion Building Corporation* v. *The King* (2) that notwithstanding the interpretation of s. 16 of the Interpretation Act a law of the Province of Ontario which did not prejudicially affect the rights of the Crown was applicable to the Crown's contract. There is no right of the Crown which is affected prejudicially or otherwise by s. 2 of the Interest Act, and it is submitted that that section is applicable to the contracts of the Crown.

Frank Gahan for the Attorney-General for Canada, intervener in both appeals, adopted the argument for the respondents in the appeals. With regard to the attempt to justify c. 11 as being "administration of justice," in other words the argument that under head 14 of s. 92 it is open to the Province to pass a law which requires somebody's consent before the person on whom the Dominion has conferred a right can come to the Court, it is submitted that it is the duty of the Province to secure the enforcement of Dominion rights, and that any attempt by the Province to prevent the enforcement of these rights is ultra vires of the Provincial Legislature: *In re Chief Justice of Alberta. Scott* v. *Attorney-General for Canada* (3); *Walker* v. *Walker* (4); *John Deere Plow Co., Ld.* v. *Wharton* (5); *Great West Saddlery Co.* v. *The King* (6); and *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (7) Chapter 11 is inapplicable to bar a Dominion right, and therefore inapplicable to this case, or by reason of its attempt to bar a Dominion right it is bad in toto; it has cast the net too wide, and therefore, even if it stood alone, it is bad legislation.

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(1) [1932] A. C. 514, 523.
(2) [1933] A. C. 533, 547–9.
(3) [1923] 2 W. W. R. 929, 936.
(4) (1919) 48 D. L. R. 1, 7, 9.
(5) [1915] A. C. 330.
(6) [1921] 2 A. C. 91, 98
(7) [1929] A. C. 260.

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D. N. Pritt K.C. replied, and referred to *Lymburn* v. *Mayland.* (1)

1940. Mar. 4. The judgment of their Lordships was delivered by VISCOUNT CALDECOTE L.C. These two appeals raise questions of the validity of three Acts of the Legislative Assembly of the Province of Alberta, all passed on April 14, 1937. In the first appeal the Provincial Guaranteed Securities Interest Act, c. 12 of the Statutes of Alberta, 1937, and the Provincially Guaranteed Securities Proceedings Act, c. 11 of the Statutes of Alberta, 1937, in so far as it relates to the subject-matter of the proceedings under appeal, have been declared ultra vires by the Appellate Division of the Supreme Court of Alberta dismissing an appeal from a judgment of Ewing J., dated October 29, 1937. In the second case the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, has likewise been declared ultra vires the Legislature of the Province as the result of a decision of the Appellate Division dismissing an appeal from a judgment of Shepherd J., dated February 11, 1939. Similar questions arise in the two appeals as to the interpretation of ss. 91 and 92 of the British North America Act, and they were heard together. It is necessary now to deal with the two cases separately.

The respondent in the first appeal (the plaintiff in the action) is the holder of a number of debentures, dated May 21, 1921, each of the principal sum of one thousand dollars, issued by the first-named appellant, and guaranteed by the Province of Alberta. The debentures bore interest at the rate of six per cent. per annum, payable half-yearly, in gold coin of, or equivalent to, the standard of weight and fineness fixed for gold coins at the date of the debentures by the laws of the United States of America, upon presentation and surrender of the coupons attached to the debentures, as the coupons severally became payable. The debentures provided that payment of interest should be made at the holder's option at the principal office of the Imperial Bank of Canada

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(1) [1932] A. C. 318.

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in Toronto, Montreal or Edmonton, or at the office of the Bank of Manhattan Company in New York.

On December 15, 1936, the respondent presented for payment at the Imperial Bank of Canada, in Toronto, coupons attached to the debentures, and dated November 1, 1936, for thirty dollars each, being in respect of interest at the rate of six per cent. The Bank, acting on the instructions of the Government of the Province of Alberta, refused payment of the amount of the coupons except to an amount representing interest at the rate of three per cent. The respondent thereupon took proceedings in the Supreme Court of Alberta to recover the full amount of the interest. The first-named appellant met the claim by relying on the provisions of the Provincial Securities Interest Act, c. 11 of the Statutes of Alberta, 1936 (Second Session), reducing the interest payable on the debentures from six per cent. to three per cent., and prohibiting any action from being brought or maintained in the Courts of the Province in respect of the debentures. At the trial of the action the Act relied on by the first-named appellant was held by Ives J. to be ultra vires the Legislature, and judgment was given for the amount claimed. Notice of appeal was given, but before the appeal was heard the two Acts in question in the present appeal were passed by the Legislative Assembly, and by s. 5 of the Provincial Securities Interest Act, c. 13 of the Statutes of Alberta, 1937, the Provincial Securities Interest Act, c. 11 of the Statutes of Alberta, 1936 (Second Session), was repealed. A few days later the appeal from the judgment of Ives J. was abandoned.

On May 1, 1937, a further amount of interest became payable, and on May 11, the respondent presented the appropriate coupons for payment at the Imperial Bank of Canada, in Toronto. The Bank again, on the instructions of the Government of the Province of Alberta, refused payment of the full amount of the interest. The respondent thereupon began the action out of which the present appeal arises to recover the interest due on the debentures. The first-named appellant in answer to the claim relied on the Act, c. 12 of the Statutes, 1937, by which the interest due at the rate of six per cent. was reduced to three per cent., and also on the Act, c. 11 of the Statutes, 1937, as a bar to the action without the consent of the Lieutenant-Governor in Council. The question in this appeal is whether these two Acts are within the powers of the Provincial Legislature having regard to the provisions of ss. 91 and 92 of the British North America Act, 1867, by which the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures was made.

The Act, c. 12 of 1937, effects its object in simple and straightforward language. After defining guaranteed securities so as to include (inter alia) the debentures concerned in this appeal, the Act proceeds by s. 3 to reduce the rate of interest payable upon any guaranteed security from and after June 1, 1936, "notwithstanding any stipulation or agreement as to "the rate of interest payable" in respect of the security. In order to bolt the door more firmly against a holder of any guaranteed security who might wish to test his rights in the Courts of the Province, it is provided by s. 3, sub-s. 2, that "no "person shall be entitled to recover in respect of any guaranteed "security any interest at a higher rate than the rate" prescribed by the Act, and the rights of the holder of a guaranteed security are stated to be such as are set out in the Act. The Act, c. 11 of 1937, carries the alteration of the rights of the debenture holder a little further. Sect. 2 defines "guaranteed "securities" as in the Act, c. 12. Sect. 3, which is the only operative section of the Act, prohibits any action or proceeding of any kind for the recovery of any money payable "in respect "of any guaranteed security, or for the purpose of enforcing "any right or remedy whatsoever for the recovery of any such "money, or for the purpose of enforcing any judgment or "order at any time heretofore or hereafter given or made "with respect to any guaranteed security, or for the purpose "of enforcing any foreign judgment founded on a guaranteed "security, without the consent of the Lieutenant-Governor in "Council."

The validity of these two Acts depends upon the

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interpretation and application of ss. 91 and 92 of the British North America Act of 1867. These sections have been the subject of repeated examination in the Judicial Committee, and there can no longer be any doubt as to the proper principles to their interpretation, difficult though they may be in application. Lord Haldane, in delivering the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (1) said: "The rule of construction is that general "language in the heads of s. 92 yields to particular expressions "in s. 91, where the latter are unambiguous." In a later decision of the Judicial Committee, *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2), Lord Tomlin summarized in four propositions (3) the result of the earlier decisions of the Board on questions of conflict between the Dominion and the Provincial Legislatures. The first proposition is to the effect that the legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by s. 92. Lord Tomlin referred to *Tennant* v. *Union Bank of Canada* (4) as the authority for this statement. In applying these principles, as their Lordships propose to do, to the present case, an inquiry must first be made as to the "true nature and character of the "enactments in question" (*Citizens Insurance Co. of Canada* v. *Parsons* (5)), or, to use Lord Watson's words in delivering the judgment of the Judicial Committee in *Union Colliery Company of British Columbia* v. *Bryden* (6), as to their "pith "and substance." Their Lordships now address themselves to that inquiry.

The long title of the Act, c. 12 of 1937, is "An Act respecting "the interest payable on debentures or other securities "guaranteed by the Provinces." The sole purpose and effect of the Act are to reduce the rate of interest on a number of securities. The holders of the securities affected by the

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(1) [1921] 2 A. C. 91, 116.
(2) [1930] A. C. 111.
(3) Ibid. 118.
(4) [1894] A. C. 31.
(5) (1881) 7 App. Cas. 96.
(6) [1899] A. C. 580.

Act were entitled, before the Act was passed, to receive interest at a rate according to the terms on which their securities were issued. The Act substituted a different rate of interest for the agreed rate. The Act clearly deals with interest, and "interest" is one of the classes of subject which by s. 91 are reserved exclusively for the Dominion Legislature. Unless, therefore, a restricted interpretation is to be given to "interest" in s. 91 (19.) instead of its ordinary meaning, it would appear on a first examination that the Act, c. 12, is not within the competence of the Province. Their Lordships, however, were invited by counsel for the appellants to say that the inclusion of "interest" in the Dominion subjects in s. 91 is to be explained by the history of earlier legislation on the subject of usury, and therefore "interest" must be read as meaning only interest which is exorbitant or usurious. This interpretation is open to the objection that as no standard is laid down by which interest is to be adjudged exorbitant or usurious, "interest" standing as it does in s. 91 without any word of qualification or limitation would seem a very uncertain description of a class of subject for the purpose of defining the exclusive legislative authority of the Dominion. Their Lordships' attention was called to s. 4 of the Dominion Interest Act of 1927 (R. S. C., c. 102) by which no interest exceeding the rate of five per cent. per annum shall be chargeable unless the contract contains an express statement of the yearly rate of interest. Legislation of this sort was said by counsel for the appellants to be akin to legislation dealing with usury. Their Lordships would be slow in forming this opinion, but even if it were so, it carries the argument no further. The Dominion Parliament in exercising the power to legislate upon "interest" might very well include in an Act dealing generally with the subject of interest provisions to prevent harsh transactions. Nor does the history of legislation in Canada on the subject of interest support the appellants' argument. Their Lordships' attention was called to a number of Canadian Acts of Parliament on the subject of usury from 1793 down to 1858. In 1858 an Act was passed by the Parliament of Canada (c. 85) which was the forerunner of the Interest Act of 1927 of the Dominion. The Act of 1858, by s. 2, in effect abolished restrictions as to rates of interest, except in the case of certain persons named in the Act. From that time forward the usury laws, which the policy of an earlier generation demanded, ceased to have effect. Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of head 19 of s. 91 in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt to lay down any exhaustive definition of "interest." The word itself is in common use, and is well understood. It is sufficient to say that in its ordinary connotation it covers contractual interest, and contractual interest is the subject of the Act now in question.

For these reasons their Lordships have come to the conclusion that the Act, c. 12 of Alberta, 1937, is in pith and substance an Act dealing with "interest" within the meaning of s. 91, (19.) of the British North America Act. Having regard to this conclusion, it becomes unnecessary to discuss at length the classes of subjects enumerated in s. 92 as being within the powers of Provincial Legislatures. It was suggested on behalf of the appellants that the Act in question is legislation concerning "Municipal Institutions in the Province" (head 8), or concerning "property and civil rights in the Province" (head 13), or, failing these, that the Act fell under head 16, "generally all matters of a merely local or private nature in "the Province." Their Lordships are unable to accept any of these contentions. In so far as the Act in question deals with matters assigned under any of these heads to the Provincial Legislatures, it still remains true to say that the pith and substance of the Act deals directly with "interest," and only incidentally or indirectly with any of the classes of subjects enumerated in s. 92. Even if it could be said that the Act relates to classes of subjects in s. 92, as well as to one of the classes in s. 91, this would not avail the appellants to protect the Provincial Act against the Interest Act of 1927, passed by the Dominion Parliament, the validity of which, in the view of their Lordships, is unquestionable. Sect. 2 of the

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Interest Act is as follows: "Except as otherwise provided by "this or by any other Act of the Parliament of Canada, any "person may stipulate for, allow and exact, on any contract "or agreement whatsoever, any rate of interest or discount "which is agreed upon." This provision cannot be reconciled with the Act, c. 12 of Alberta, 1937, and, as Lord Tomlin made clear in the case already cited of *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), Dominion legislation properly enacted under s. 91 and already in the field must prevail in territory common to the two Parliaments.

Their Lordships were pressed with the decision of the Board in *Ladore* v. *Bennett.* (2) In that case a Provincial Legislature passed Acts amalgamating and incorporating in one city four municipalities which were in financial difficulties. As part of the consequent adjustment of the finances of the municipalities, debentures of the new city of equal nominal amount to those of the old municipalities were issued to the creditors, but with the rate of interest reduced. It was held by the Judicial Committee that a Provincial Legislature, which could dissolve a Municipal Corporation and create a new one to take its place, could legislate concerning the financial powers of the new corporation, and incidentally might define the amount of interest which the obligations incurred by the new city should bear. On this ground it was decided that legislation directed bona fide to the creation and control of municipal institutions is in no way an encroachment upon the general exclusive power of the Dominion Legislation over interest. Having come to the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under s. 92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new city was not an invasion of Dominion powers under head 19 of s. 91.

The decision of the Court of Appeal of British Columbia in *Day* v. *Victoria* (*City*) (3) holding the Victoria City Debt Refunding Act, 1937, intra vires of the Provincial Legislature, was also cited as a case in which it was held permissible for a Provincial Legislature to pass an Act relating to interest. On examination, the decision is found to give no support to the appellants' argument. The Act there in question did not purport to be an Act relating generally to "interest," and while some of its provisions dealt with interest as an incident effecting the general object of the enactment, it was held, rightly as their Lordships think, not to be an Act in relation to "interest," or to conflict with the Dominion Interest Act. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), which was also cited, the question was whether Acts of the Dominion Parliament dealing with the liabilities of farmers and with creditors' arrangements came under head 21 of s. 91 of the British North America Act "Bankruptcy and insolvency ", or head 13 of s. 92, "Property and civil rights in the "Province." The Judicial Committee held that the Acts in question related to "bankruptcy and insolvency." The case is one more illustration of the rule that, in resolving the questions that are bound to arise between these two famous sections of the British North America Act, is it essential first to examine the "true nature and character " of the legislation in question.

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(1) [1930] A. C. 111.
(2) [1939] A. C. 468.
(3) [1938] 3 W. W. R. 161.

The Act, c. 11 of 1937, prohibiting actions or proceedings to enforce rights with respect to guaranteed securities without the consent of the Lieutenant-Governor in Council must, in their Lordships' judgment, stand or fall with the Act, c. 12. Each of the two Acts applies to "guaranteed securities " as defined in identical terms. The Acts are in fact designed to effect one and the same purpose, namely, to reduce the rate of interest on the securities to the level fixed by the Act, c. 12. If the Act, c. 11, can properly be passed as relating to one or other of the classes of subjects in s. 92, it enables the Government of Alberta, acting through the Lieutenant-Governor in Council, to allow proceedings in the courts to recover interest at the rate which the Government fix, but at no higher rate. By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Act, c. 12. In other words, the Act, c. 11, is an attempt to do by indirect

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(1) [1937] A. C. 391.

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means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of ss. 91 and 92. Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in *Madden* v. *Nelson and Fort Sheppard Ry.* (1): "It is a very familiar principle that you cannot do that "indirectly which you are prohibited from doing directly." The substance and not the form of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that under colour of an Act relating to the class of subject described in head 14 of s. 92, the Provincial Parliament has passed legislation which is beyond their powers.

In the result, their Lordships agree with the judgments of Ewing J. and of the majority of the Appellate Division of the Supreme Court of Alberta, and they will humbly advise His Majesty that this appeal should be dismissed, with costs.

The question in the second appeal is whether the Act, c.13 of the Statutes of Alberta, 1937, is within the powers of the Alberta Legislature. The respondent began the proceedings by way of petition claiming that the Act is ultra vires the Alberta Legislature, and asking for a declaration of the Court accordingly. The respondent is a body corporate in accordance with the law of the Province, and owns a number of debentures to the amount of 373,000 dollars, lawfully issued by the Province under powers conferred on the Province by Statutes of Alberta and Orders of the Lieutenant-Governor in Council. The debentures, which were issued at different dates, bear rates of interest varying according to the conditions of the several debentures. The respondent, on presenting interest coupons from time to time, has been refused payment of interest by the defendant at the agreed rates. The defendant relied on, and now pleads, the provisions of the Act, c. 13 of 1937, entitled "An Act respecting the Interest payable on Debentures and "other securities of the Province." The Act applies to all debentures theretofore issued by the Province. Sect. 3, sub-s. 1, of the Act provides that: "Notwithstanding any

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(1) [1899] A. C. 626, 627.

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"stipulation or agreement as to the rate of interest payable in respect of any security, on, from and after the first day of "June, 1936, the rate at which interest shall be payable in "respect of any security shall be as follows: ". The new rates are then set out, and, in general, they are half the agreed rates. Sect. 3, sub-s. 2, declares the rights of holders of the debentures of the Province covered by the Act to be those set out in the Act. These two sub-sections are the whole Act, apart from a section protecting trustees or fiduciaries, and another section repealing the Act of the previous session, of which the short title was the Provincial Securities Interest Act.

Their Lordships have considered the Act with a view to ascertaining its "true nature and character," or "its pith "and substance." It relates in substance not to borrowing, but to payment of interest in respect of existing debentures and other securities at less than the contract rates. The appellant made submissions similar to those presented in the first appeal, and their Lordships, without repeating the reasons already given in deciding the first appeal, take the same view of this Act as of the two Acts, cc. 11 and 12 of 1937. Their Lordships were invited to hold that the Act, c. 13, could be justified by reference to head 3 of s. 92, "the borrowing of "money on the sole credit of the Province." The argument, in their Lordships' view is not well-founded on the facts of this case, and fails by reason of their view that in pith and substance this Act relates to "interest."

The appellant submitted one other argument with which it is necessary to deal. It was said that the position of the Crown is not touched by s. 2 of the Interest Act of Canada by reason of the provisions of s. 16 of the Interpretation Act (R. S. C., 1927, c. 1), which enshrines the doctrine that the Crown is not bound by any Act unless it is expressly mentioned therein. The argument could only be relevant on the assumption that the Act, c. 13, would be valid but for the fact that it conflicts with the Dominion Interest Act. Their Lordships, however, take the view that the Provincial Act is ultra vires on the ground that its pith and substance relate to interest.

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If it was necessary to deal with the appellants' submission that the Crown is not bound by the Interest Act, their Lordships would be content to adopt the judgment on this point of Shepherd J.

Their Lordships will humbly advise His Majesty that this appeal also should be dismissed.

The appellants will pay the respondents' costs.

Solicitors for appellants in both appeals: *Blake & Redden.*

Solicitors for respondents and for the Attorney-General for Canada in both appeals: *Charles Russell & Co.*

[PRIVY COUNCIL.]

TRUE . . . . APPELLANT;

AND

AMALGAMATED COLLIERIES OF W. A., LIMITED . . . . RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Western Australia—Industrial arbitration—Award—Miner—Verbal engagement at tonnage rates—Upon terms and conditions of an award—Claim to recover deduction of wages—Employee's contractual right—Statutory limitation period inapplicable—Industrial Arbitration Act, 1912–1935, *of Western Australia, s.* 176, *sub-s.* 2 *—Award No.* 32 *of* 1934.

By sub-s. 2 of s. 176 of the Industrial Arbitration Act, 1912–1935, of Western Australia: " Every worker shall be entitled " to be paid by his employer in accordance with any industrial " agreement or award binding on his employer and applicable " to him and to the work performed, notwithstanding any con- " tract or pretended contract to the contrary, and such worker " may recover as wages the amount to which he is hereby declared " entitled in any court of competent jurisdiction, but every " action for the recovery of any such amount must be commenced " within twelve months from the time when the cause of action " arose."

The appellant, a coal miner, was verbally engaged by the respondents to work for them at tonnage rates, and not at day rates, upon the terms and conditions of a statutory award made by the Industrial Board appointed under the Industrial Arbitration Act, 1912–1935, of Western Australia, and his contract of service therefore contained, as part thereof, all the relevant provisions of that award, including the appropriate provisions as to wages. The appellant worked for one year, and the respondents, claiming that the tonnage rates were affected by a provision in the Act that the day wages should vary with the fluctuations of a " basic " wage " prescribed by the award, deducted from the sum earned by the appellant sums totalling *8l.* 1*s.* 9*d.* On a claim by the appellant under his contract to recover that sum, it being admitted for the purposes of this appeal that the deduction ought not to have been made :—

Held, that since the appellant was entitled to his wages under his contract, and sued on his contract alone, he had no need to assert the right given by s. 176 of the Industrial Arbitration Act, 1912–35, and he was not therefore bound by the twelve months limitation period therein contained. Sect. 176 dealt with contracting out, and sub-s. 2 presupposed the existence of a contract of employment which, as to its wages provision, was inconsistent with an industrial agreement or award, and gave the workman a statutory right to recover " as wages " the amount fixed by the agreement or award, and it was that statutory right alone which was subject to the time-bar of twelve months. If the workman claimed against the terms of his contract he was given the shortened time limit, but the time within which he might sue to enforce the terms of his contract was not affected.

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT SANKEY, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

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Appeal (No. 61 of 1939) from an order of the High Court of Australia (April 4, 1938) varying an order of the Full Court of the Supreme Court of Western Australia (October 29, 1937).

The appellant, Gwyn A. True, a coal miner, was verbally engaged by the respondents, Amalgamated Collieries of W. A., Ld., to work as a miner at tonnage rates upon the terms and conditions of an award (No. 32 of 1934) made on August 23, 1934, by the Industrial Board appointed under the Industrial Arbitration Act, 1912-1935, of Western Australia. His contract of service therefore contained, as part thereof, all the relevant provisions of that award, including the appropriate provisions as to wages. Pursuant to that engagement he worked for the respondents for one year ending on September 26, 1936. The award provided both day wages and tonnage rates, and the Industrial Arbitration Act provided that the day wages should vary with the fluctuations of a "basic wage" prescribed by the award. The respondents, claiming that the tonnage rates were also affected by the provision for fluctuation, deducted from the sum of 319*l.* 8*s.* 10*d.* earned by the appellant during the year sums amounting to 8*l.* 1*s.* 9*d.*, part of which, namely, 3*l.* 8*s.* 10*d.* was earned within twelve months of the commencement of the action which the appellant brought in the local court at Collie, Western Australia, to recover payment of the 8*l.* 1*s.* 9*d.*

The respondents did not now contend that they were entitled to make the deductions based on fluctuations in the "basic wage" from the appellant's wages, and the only point at issue in this appeal was whether the appellant's claim was, as to 4*l.* 12*s.* 11*d.*—the portion of the 8*l.* 1*s.* 9*d.* not earned within twelve months from the time when the cause of action arose—time-barred under s. 176, sub-s. 2, of the Industrial Arbitration Act, which provides :—

"Every worker shall be entitled to be paid by his employer "in accordance with any industrial agreement or award "binding on his employer and applicable to him and to the "work performed, notwithstanding any contract or pretended "contract to the contrary, and such worker may recover as "wages the amount to which he is hereby declared entitled in "any court of competent jurisdiction, but every action for the "recovery of any such amount must be commenced within "twelve months from the time when the cause of action "arose."

In the local court the magistrate gave judgment for the respondents, but on appeal the Full Court of the Supreme Court of Western Australia (Northmore C.J. and Dwyer J.) set aside that judgment, and entered judgment for the appellant for the full amount of 8*l.* 1*s.* 9*d.*

On appeal by the respondents to the High Court of Australia, Latham C.J., Starke and Dixon JJ. were of opinion that as to 4*l.* 12*s.* 11*d.*, the action was time-barred under s. 176 of the Act, while Evatt and McTiernan JJ. were of opinion that the section did not apply.

The appellant now appealed.

It was stated that the action was a test action, that some three hundred employees of the respondents had similar claims, and that if the majority decision of the High Court were upheld the effect would be to reduce the normal period of limitation from six years to twelve months in the case of every worker to whom an industrial agreement or award applied.

1940. March 5, 7, 8. *D. L. Jenkins K.C.* and *J. H. Stamp* for the appellant. The sole question on this appeal is as to the applicability of the twelve months period of limitation prescribed by sub-s. 2 of s. 176 of the Industrial Arbitration Act, 1912-35, of Western Australia. It is submitted that the sub-section deals, and deals only, with cases in which there has been contracting out. The present contract was one in conformity with the award and not against it. The whole scope of s. 176 of the Act is to avoid conflicting with the Act, and to confer statutory rights of action in excess of those contracted for, and the section has no application to the enforcement of valid contractual rights created independently of the Act. The respondents' contention is that sub-s. 2 does more; that it imposes a period of limitation which is universal, and which requires the twelve months limitation period in every case in which it is sought to recover award wages, including a case like the present one, in which there is a perfectly valid contract to pay award wages. The Act in question is typical of Acts which have been passed in all the States of Australia, and also in New Zealand. If the section says in unmistakeable terms that a workman is only to get one year instead of six within which to bring his action, then the Board will be constrained to give effect to it, but it is rather surprising to find a provision of that kind in protective legislation. The claim is in contract; the appellant had a valid contract, and is suing upon it. Sub-s. 1 of s. 176 prohibits contracting out, and the whole point of sub-s. 2 is to give a workman a right to be paid notwithstanding any contract to the contrary. The view of the Supreme Court of Western Australia on the construction of the section is right. There is nothing in the act to deprive of its validity a contract which does not infringe the award. It is submitted that Latham C.J. and Starke J. in the High Court do not recognize the distinction between a valid contract and a contract which infringes the award, and that the analysis of sub-s. 2 by McTiernan J. is correct. [Reference was made to *Swaney* v. *Wheatley and Another* (1); *Turnbull* v. *Forbes* (2); and *McKerlie* v. *Lake View and Star, Ld.* (3)]. Unless the contract is inconsistent with the award the claim is under the contract and not under s. 176; the contract incorporates the award. There are four New South Wales cases under the Act of that State: *Ex parte Brandt* (4), which does not appear

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(1) (1906) 8 W. A. L. R. 199.
(2) (1923) 26 W. A. L. R. 59.
(3) (1937) 58 C. L. R. 396, 404, 413–14.
(4) (1912) 12 N. S. W. St. R. 105.

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to throw much light on the question now to be decided; *Josephson* v. *Walker* (1), in which it was held that the proceeding to recover the award rate notwithstanding a contract to the contrary was a statutory proceeding, and not one under the contract at all; *Drury* v. *Dulhunty* (2); and *Fagan* v. *The Public Trustee.* (3) Those four cases are only of assistance as showing the trend of decisions on the New South Wales Act which is directed to a similar object, and the special restriction imposed on the remedy is held to be applicable only to the statutory right. *Burn* v. *Baziuros* (4)—the language of the section applicable in that case is entirely different—shows under parallel legislation that the special restriction on recovery of wages only applies where the claimant is seeking to assert the award as overriding the terms of the contract. If this is simply an action on the appellant's contract, as it is submitted it is, then the period of six years applies: Western Australian Limitation Act, No. 35 of 1935. In contending that the construction placed upon s. 176 is correct, reliance is also placed upon the actual language of the section itself. If there be any ambiguity there is a variety of reasons why the appellant's construction should be preferred; in the first place, it is more in accord with the apparent object of the legislation, which is to secure to every workman a proper remuneration for his services; secondly, the appellant, it is submitted, is entitled to rely on the principle that a statute should not be construed as taking away rights or altering what is the law unless it contains clear words to that effect. There is nothing in the section to say that a contract in conformity with the award is invalid, and under the general period the limitation is a six year period.

J. H. Stamp followed. Sub-s. 2 of s. 176 adds nothing to, and takes nothing from, the law, or from the rights of anyone, until the words "but every action for the recovery of any such "amount," etc., are reached; those are the only words that can possibly deprive a workman of any right that he has under a valid contract. It is very striking if a sentence beginning with the word "but," which is only adopted to modify something which goes before, should also modify rights which do not go before, but have not been mentioned before at all, namely, contractual rights. It would be difficult to find a parallel if that is the true construction of the sub-section. The two matters relied upon in the section as enforcing the construction the appellant seeks to put upon it are the word "such" before "worker," which can have no meaning unless it cuts down the meaning of the word "every"; and the word "but," which introduces the last sentence: those two words have coercive force. The one year limitation period only applies when the workman is suing against his contract.

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(1) (1914) 18 C. L. R. 691.

(2) (1921) 21 N. S. W. St. R. 514.

(3) (1934) 34 N. S. W. St. R. 189.

(4) (1920) V. L. R. 357.

D. N. Pritt K.C. and *Victor Wolff* (for *C. M. Cahn*, serving with His Majesty's forces) for the respondents. It is submitted that sub-s. 2 means that every worker shall be entitled to be paid in accordance with the award, and that, too, notwithstanding that there is a contract to the contrary. It is merely restating s. 83 of the Act, and the view that s. 176, sub-s. 2, was necessary to give workmen rights to wages that they did not otherwise get is erroneous. "Such worker" means a workman so entitled to be paid. "As wages" does not mean recover something which are not wages as wages. If there is a contract of service to which an award applies, what the workman really gets is wages, and therefore "recover as "wages" really means recover this as wages. With regard to the words "the amount to which he is hereby declared "entitled," this sub-section is intended to be a mere recording of rights which would exist without the assistance of the sub-section. On the words themselves, the last part of the sub-section is very strongly in the respondents' favour; the use of the word "but" is not fatal in the construction of the meaning of the legislation. The latter part of sub-s. 2 is dealing with actions for the recovery of any amount in respect of which reference must be made to an award to ascertain the amount due. The argument on the bare construction is well illustrated in the judgment of Starke J., and it is submitted that that is right. The Board were asked not to construe this sub-section so as to take away a right.

It is not taking away a workman's right to say that he must litigate within twelve months; that is a restriction, but it does not deprive him of a right. Without s. 176 altogether, a worker in this sort of case would clearly have a right to sue for the money due under the award under the statute and the common law of contract, taking the case where he agrees to take something less than the award figure: s. 83 of the Act. The statute has intervened upon the agreement, has destroyed part of it and has compulsorily put something else in its place. It is an Act which breathes compulsion into almost every line of it, and without s. 176 one would be bound to say that any agreement to pay less than the fixed wage is one which would be ruled by a Court as lawful. The distinction between the statutory and contractual right is a small one; when the Act does impose a right it is in fact no more than an implied term of the contract. Taking an agreement to serve for less than the award terms, an agreement to serve for exactly the award terms, and an agreement to serve perfectly silently, it is submitted that all really have the same result for the purposes of this case, but in each case a workman cannot make good to the Court his right to be paid a particular sum of money without turning to the award as an integral part of the evidence to build up his case—it is the yard stick. In every case he has to plead a contract, and in every case he has to turn to the award as the yard stick. The only sound and proper construction of such a section as s. 176 is that treating it as perfectly general and applying it to such cases as the present. The action brought by the appellant was one for the recovery as wages of an amount to which he was declared by the Act to be entitled, and accordingly by reason of the proviso to sub-s. 2 of s. 176 he was only entitled to recover such amounts as fell due within twelve months before the commencement of his action.

Counsel was not required to deal with the authorities, but he submitted that *McKerlie* v. *Lake View and Star, Ld.* (1) was very near to the present case.

(1) 58 C. L. R. 396.

Victor Wolff followed.

D. L. Jenkins K.C. replied. As to the Act without s. 176, that section being in it, there is no room for implications.

1940. April 5. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. The question for decision on this appeal is whether the appellant's action is to any extent time-barred under s. 176, sub-s. 2, of the Industrial Arbitration Act, 1912–35 (of Western Australia), and the answer depends upon the true construction of that section.

The Act establishes a Court of Arbitration with jurisdiction to deal with and determine all industrial matters, including power to make awards, each of which while in force operates (see s. 83) "as a common rule of any industry to which it "applies." The Court's authority may be delegated to an Industrial Board. At the dates relevant to this appeal there was in force, as regards the parties to this appeal, an award (No. 32 of 1934), being an award (No. 10 of 1931) made by the Industrial Board as amended in August, 1934, by the Court of Arbitration.

The admitted facts show that the appellant was verbally engaged by the respondents to work for them as a miner at tonnage rates, and not at day wages, upon the terms and conditions of the award No. 32 of 1934. His contract of service therefore contained, as part thereof, all the relevant provisions of that award, including the appropriate provisions as to wages. Pursuant to that engagement the appellant worked for the respondents for one year, ending on September 26, 1936, and was paid wages which are alleged, by him, to be insufficient under the terms of his contract of service by an amount of 8*l.* 1*s.* 9*d.* On April 12, 1937, he commenced proceedings by summons in the local court at Collie, Western Australia, claiming payment of that sum. The respondents raised two defences, one which, if successful, would defeat the whole claim, the other, that as to 4*l.* 12*s.* 11*d.* the claim was time-barred under s. 176, sub-s. 2, of the Act.

In the local court the magistrate acceded to the first defence, and entered judgment for the respondents. On appeal, the

Full Court of the Supreme Court of Western Australia (Northmore C.J. and Dwyer J.) set aside that judgment, and entered judgment for the appellant for the full amount of 8*l.* 1*s.* 9*d.* The respondents then appealed to the High Court of Australia, with the result that by order of that Court dated April 4, 1938, the order of the Supreme Court was varied by substituting the sum of 3*l.* 8*s.* 10*d.* for the sum of 8*l.* 1*s.* 9*d.* All the judges in the High Court were in agreement in rejecting the first ground of defence; but the Chief Justice and Starke and Dixon JJ. were of opinion that as to 4*l.* 12*s.* 11*d.* the action was time-barred under the section, while Evatt and McTiernan JJ. were of opinion that the section did not apply. The action is a test action, and by Order in Council leave was given to the appellant to appeal to His Majesty in Council. There is no appeal from the decision of the High Court in regard to the first ground of defence. The only question for their Lordships' consideration is whether the appellant's claim is, as to 4*l.* 12*s.* 11*d.*, time-barred under the section.

The section runs thus:—

"176.—(1.) Subject to section thirty-nine no person shall be "freed or discharged from any liability or penalty or from the "obligation of any industrial award or agreement by reason of "any contract made or entered into by him or on his behalf, "and every contract, in so far as it purports to annul or vary "such award or agreement, shall, to that extent, be null and "void without prejudice to the other provisions of the contract "which shall be deemed to be severable from any provisions "hereby annulled.

"(2.) Every worker shall be entitled to be paid by his "employer in accordance with any industrial agreement or "award binding on his employer and applicable to him and to "the work performed, notwithstanding any contract or pre-"tended contract to the contrary, and such worker may "recover as wages the amount to which he is hereby declared "entitled in any court of competent jurisdiction, but every "action for the recovery of any such amount must be com-"menced within twelve months from the time when the cause "of action arose."

In the judgments in the High Court, and in the course of the argument before the Board, decisions were cited upon other and different enactments by other Legislatures; but having considered those authorities with care, their Lordships have found that they afford no real assistance or guide in answering the question which arises on this appeal. The section they think must be construed upon a consideration of the language used, and of the Act in which it finds a place.

The Supreme Court appear to have thought the position reasonably plain. They held that the sub-section only applied where the workman could not under the provisions of his contract obtain the full amount of wage fixed by the award, but was forced to have recourse to the sub-section in order to obtain the difference between his contract wage and the amount fixed by the award; and that since the appellant sued on his contract alone, he had no need to pray the sub-section in aid, and was therefore not subject to the sub-section's time-bar.

The majority in the High Court thought that in every case in which a worker was seeking to recover wages of an amount which was fixed by an award, he was (whether entitled to it by the provisions of his contract or not) seeking to recover an amount to which s. 176 declared him to be entitled, and that accordingly the twelve months' limitation applied.

On the other hand, Evatt and McTiernan JJ. took the same view of the section as that adopted by the Supreme Court. They were of opinion that as the appellant was entitled to his wages under his contract, he had no need to assert the right given by the section, and was therefore not bound by the limitation therein contained.

In view of this conflict of eminent judicial opinion the question obviously cannot be said to be plain or easy of solution; but on consideration their Lordships find themselves in agreement with the views of Evatt and McTiernan JJ. and the Supreme Court.

The section is, in their opinion, a section dealing with a particular subject-matter, namely, contracting out, i.e., with contracts of service which are inconsistent with industrial agreements or awards. The first sub-section annuls any provision in a contract of service inconsistent with an industrial award or agreement. If one of the offending provisions should be the provision as to wages, a difficult situation for the servant might arise. There might be a difficulty in suing on a quantum meruit, or on an implied promise to pay the amount fixed by the industrial award or agreement, in view of the fact that the parties had de facto purported to stipulate for a specified and a different sum. The second sub-section meets and overcomes this difficulty, by declaring that, notwithstanding the contract or pretended contract to the contrary, the worker shall be entitled to be paid in accordance with the industrial agreement or award, and may recover the amount to which he is by the sub-section declared entitled " as wages," but subject to the short period of limitation. In other words, the second sub-section presupposes the existence of a contract of employment which, as to its wages provision, is inconsistent with an industrial agreement or award, and deals with such a case by giving the workman a statutory right to recover " as wages " the amount fixed by the industrial agreement or award, as the case may be. It is that statutory right alone which is subject to the time-bar of twelve months. If he claims against the terms of his contract he is given the shortened time limit, but the time within which he may sue to enforce the terms of his contract is not affected.

Their Lordships think that this construction is the only one which gives due effect to all the words of the section. The effect of the rival view would be to reduce the normal period of limitation from six years to twelve months in the case of every worker to whom an industrial agreement or award applies—an enormous industrial field even if one were to except, as Dixon J. does, the cases in which the contract wage exceeds the amount fixed by the industrial agreement or award. It would be strange to find so drastic and sweeping a change in the laws of limitation in a contracting-out provision, or enacted otherwise than in the clearest possible terms. The sub-section, if that had been intended, need only have provided that every worker to whom an industrial agreement or award applied might recover wages in accordance therewith, but that every action for the recovery of wages the amount of which was in fact fixed by an industrial agreement or award must be commenced within twelve months from the time when the cause of action arose.

On the other hand, the construction which their Lordships prefer to adopt assigns an operation and effect to every word in the sub-section. It attributes to the words " such worker " a qualifying meaning which narrows the general expression " every worker," by limiting it to a worker whose contract or pretended contract is " to the contrary." It attributes to the words " as wages " the meaning that the workman may recover, as if payable under a contract of service, money due as a statutory right. It attributes to the words " is hereby " declared entitled " the meaning that a new right is being conferred by the sub-section. It attributes to the words " such amount " the meaning of the amount which the worker is so given the right to recover as wages.

For the reasons indicated, their Lordships are of opinion that the appeal should be allowed, the order of the High Court discharged, except as to costs, and the order of the Supreme Court restored. They will humbly advise His Majesty accordingly.

The respondents will pay the costs of this appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *M. L. Moss & Son.*

[HOUSE OF LORDS.]

CAMERON . . . . APPELLANT;

AND

PRENDERGAST (INSPECTOR OF TAXES) . RESPONDENT.

H. L. (E.)*

1940

Feb. 12, 13; *Mar.* 12.

Revenue—Income tax—Payment of lump sum to director to induce his non-resignation—Liability to tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E.*

The appellant was, and for many years had been, a director of a limited company. Being minded to resign that office he informed his fellow directors of this intention, but they, being anxious to retain his services, wrote requesting him in the interests of the company not to resign and stated that if he acceded to their request they would pay him the sum of 45,000*l.*, and that this promise would be embodied in a formal deed. The appellant accepted the offer and agreed to remain on the board of directors in an advisory capacity, his remuneration being fixed at 400*l.* per annum instead of 1500*l.* which he had previously received. Having been paid the 45,000*l.* he was assessed to income tax in respect thereof as being a profit arising from his office of director under Sch. E of the Income Tax Act, 1918:—

Held, that the appellant's continuance in the office of director was the essence of the bargain between the company and him; that money paid as a consideration for his agreeing not to cease giving his services as a director necessarily involved an agreement to continue to render those services; and that the money so paid as the consideration for that bargain was a profit from his directorship, and, as such, liable to income tax.

Hunter v. *Dewhurst* (1932) 16 Tax Cas. 605 distinguished.

Observations of Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley* [1908] 2 K. B. 89, 95, and those of Lord Atkinson in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433, 449, approved by Viscount Maugham.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The question was whether the appellant was liable to income tax in respect of a sum of 45,000*l.* paid to him by a private company in which he held a directorship as being a profit arising from the office of director within Sch. E of the Income Tax Act, 1918, which imposes the tax "on every "person having or exercising an office or employment of

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

"profit mentioned in this schedule . . . . in respect of all "salaries, fees, wages, perquisites or profits whatsoever there- "from . . . ."

The appellant, who had been for many years a director of Higgs and Hills, Ld., intimated to the company that he decided to resign his office of director under art. 107 (*d*) of the company's articles of association. The company, however, being anxious not to lose the benefit of his services wrote to him the following letter: "The board have considered your recent "intimation that, in the exercise of your right so to do under "art. 107 of the company's articles you intend forthwith to "determine your directorship, and I am authorised to ask "you, in the interests of the company, not to serve such "notice and to say that, in consideration of your acceding "to this request, the company will, within 21 days or by "such instalments as you will accept, pay you the sum of "45,000*l.* and will embody their undertaking so to do in a "formal deed reciting this letter." The appellant assented to this proposal, and a deed was executed between him and the company, the material portion of which was as follows:— "Whereas Mr. Cameron is a director of the company.

"And whereas the company in the circumstances set out in "the letter hereunto annexed has for the consideration therein "specified agreed to make to Mr. Cameron the payments "hereinafter set out And it is hereby agreed between the "parties that the company shall pay to Mr. Cameron the "following sums on the following dates: On the 31st day of "December 1934 the sum of 35,000*l.* and on the 31st day of "March 1935 the sum of 10,000*l.*

"In witness whereof the company have hereunto affixed "their common seal and Mr. Cameron has hereunto set his "hand and seal the day and year first above written."

The letter annexed was that set out above.

Thereafter the appellant continued to act as a director at a salary of 400*l.* in lieu of that previously paid to him, namely, 1500*l.*

The appellant having been assessed to income tax under Sch. E in respect of the sum of 45,000*l.* so paid to him by the company, appealed to the Special Commissioners who allowed his appeal, but stated a case for the opinion of the High Court.

The case was heard by Lawrence J. who reversed the decision of the Special Commissioners and allowed the appeal, and his judgment was affirmed by the Court of Appeal, the Master of the Rolls dissenting.

The appellant appealed to this House.

Raymond Needham K.C. and *R. A. Willes* for the appellant. The nature of the payment of 45,000*l.* to the appellant is to be determined by the terms of the deed which show that it was a capital payment, and as such is therefore not liable to income tax. If a payment is made to a person to induce him to take up, or to continue in, a certain employment it cannot be said to be a remuneration in respect of his office. Suppose a distinguished person is desired by a company to accept office as a director, the company saying to him " we "will give you 10,000*l.* if you will agree to serve on our board "at *x* pounds per year," and he agrees to do so and is paid the sum named, the payment comes to him not as remuneration in respect of his office as director, it is paid to him as an inducement to accept it. That is precisely similar to the position here. *Hunter* v. *Dewhurst* (1) supports the view for which we contend. There the articles of association of a company provided that " in the event of any director dying "or resigning his office . . . . the company shall pay to him "or his representatives by way of compensation for the loss "of office," a certain sum. The sum paid under this article was held to be a capital sum and as such was not liable to be charged as " profit from the employment."

Inland Revenue Commissioners v. *Westminster* (*Duke*) (2) was also referred to.

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent were not called upon.

The House took time for consideration.

(1) 16 Tax Cas. 605.

(2) [1936] A. C. 1.

VISCOUNT CALDECOTE L.C. (read by VISCOUNT MAUGHAM). My Lords, the appellant was at the material time a director of a well known building company, Higgs and Hill, Ld. He had been employed by the company for forty-four years and had been a director of the company since 1919. The company was a prosperous one and the appellant was largely responsible for its success. In 1934 he was minded to resign his position as director because he desired a rest, and he informed his fellow directors of his intention to give notice in writing to the secretary of the company with the result that, by virtue of art. 107 (*d*) of the articles of association, his office would be vacated. The company was, not unnaturally, anxious to retain his services and on December 17, 1934, a letter was written by the direction of the board to the appellant informing him that the board had considered his intimation that he intended forthwith to determine his directorship. The letter went on to ask him in the interests of the company not to serve the proposed notice, and stated that in consideration of the appellant acceding to this request the company would within twenty-one days, or by such instalments as he would accept, pay him a sum of 45,000*l*. This undertaking would be embodied in a formal deed reciting the letter. The appellant accepted the offer. Accordingly by a deed of December 31, 1934, which recited that the appellant was then a director of the company and that the company had in the circumstances set out in the letter of December 17, annexed to the deed, for the consideration specified in the letter, agreed to make Mr. Cameron two payments amounting in all to 45,000*l*., the first payment on December 31, 1934, and the second on March 31, 1935, the company bound themselves to make these payments. On the same day a board meeting was held, at which the appellant was present, and it was resolved that the appellant should remain on the board of directors in an advisory capacity, and that his remuneration should be fixed at the rate of 400*l*. per annum as from the date of the meeting.

The question which arises in this appeal is whether the appellant is liable to income tax in respect of the sum of

45,000*l.*, as being a profit arising from the office of director under Sch. E of the Income Tax Act. The Special Commissioners have held that the appellant received the sum in question for the consideration expressed in the letter and embodied in the deed. They accepted the deed as genuine and found that the conditions of the deed had been carried out. They, therefore, held that the sum of 45,000*l.* was not subject to income tax under Sch. E in the hands of the appellant and discharged the assessment. Lawrence J. reversed this decision on the ground that the true consideration for the payment of the 45,000*l.* must have been the desire of the company that the appellant should continue as a director with the result that the payment arose from his office as director. The Court of Appeal by a majority approved the judgment of Lawrence J., and this appeal is from their decision.

Tax is charged under Sch. E in respect of every public office or employment of profit. Rule 1 of the Rules applicable to Sch. E provides that tax shall be charged " on every person "having or exercising an office or employment of profit "mentioned in this Schedule . . . . in respect of all salaries, "fees, wages, perquisites or profits whatsoever therefrom "for the year of assessment." It is admitted that the appellant's directorship was an office of profit and that he received the sums in question in the year of assessment while holding that office. The only question, therefore, is whether these payments arose from the office held by the appellant. We have been invited by learned counsel on behalf of the appellant, in considering this question, to fix our gaze on the precise words of the letter of December 17. Reference was made to the decision in *Inland Revenue Commissioners* v. *Duke of Westminster* (1), in which observations were made by Lord Tomlin and others of your Lordships as to the importance of giving effect to the proper legal interpretation of documents, provided they are bona fide and not only used as a cloak to conceal a different transaction. It had been argued on behalf of the Inland Revenue Commissioners in that case that the substance of the arrangements contained in the

(1) [1936] A. C. 1.

material documents must be regarded, and not merely the form. Such a suggestion found no favour with the majority of the noble and learned Lords who heard that appeal, and I certainly have no intention of departing in any way from what was there laid down. But how does it help the appellant? In this case the substance and the form of the documents seem to me to be the same. The appellant was anxious to retire and, but for the inducement offered to him not to do so, he would have signed a notice of resignation. The company valued his services and they were prepared to pay a large sum to him to induce him to abstain from his intention to resign, and thus to continue as director.

Your Lordships are asked to say that, in these circumstances, the only consideration for the payment was the act of the appellant in acceding to the request of the company not to serve the notice of resignation. If it were not for the approval given by the Master of the Rolls to this submission, I should have thought it only required to be stated to be rejected. I can see no difference between a promise not to resign and a promise to continue to serve as director. It is true that the appellant did not give any promise in words to continue to serve for any period of time, any more than the board by their resolution of December 31 named a term of service. It is fair to assume that, in the course of a long connection of the appellant with the company, his fellow directors had learned that they could trust him. Whether or not it was open to him, having received the sum, to resign immediately afterwards is a question which I find unnecessary to answer. The appellant's colleagues on the board no doubt knew the man with whom they had to deal, and were confident that if he received the money they were prepared to pay him they would get good value for it.

My Lords, like the Special Commissioners, I accept the deed as genuine. The consideration stated in the deed for the payment of the money is that the appellant should not resign. If he resigned, his office as director would cease. If he did not resign, it would continue. To call the continuance of his office " a by-product of the undertaking not to deliver "notice of resignation" seems to me, with all respect to the Master of the Rolls, to be a misdescription of the contract. The continuance of the appellant in his office was the essence of the bargain. If anything was needed to make plain the intention of the parties as expressed in the letter and in the deed, the minute of the board of December 31 is conclusive. I agree with the statement by Luxmoore L.J. that, so far as the company was concerned, the only legitimate ground for making the payment was to induce the appellant not to resign and so to continue his services as a director. The Master of the Rolls was of opinion that if, having received payment of the 45,000*l.*, the appellant had forthwith served a notice of resignation, the company's cause of action would have been for damages for breach of a contract not to serve the notice of resignation. I do not know what damages could be recovered for the breach of such an agreement, if it is to be regarded as a mere contract not to send a piece of paper containing notice of resignation. If, on the other hand, it is something more than that, it could only be what the form of words used in the letter seems to me to express, namely, an agreement to continue as a director of the company in consideration of the payment of 45,000*l.*

Your Lordships were pressed with the decision in *Dewhurst's* case. (1) I agree with all the members of the Court of Appeal, and with Lawrence J., that that decision does not cover this case. The facts were, as Lord Warrington said, very special. Lord Atkin and Lord Thankerton, who decided that case with Lord Warrington in favour of the taxpayer, treated the payment in question as a sum paid for the release of the company from obligations which they would themselves have to meet. The facts of this case are wholly different and are such as to make it impossible to come to a similar conclusion. The conclusion which I have reached is that the payment in question was a payment arising from the appellant's office. This is, I think, the inevitable result of giving effect to the precise form as well as to the substance of the documents on which the case depends.

(1) 16 Tax Cas. 605.

It follows that in my opinion the order of the Court of Appeal should be affirmed and this appeal dismissed with costs.

VISCOUNT MAUGHAM. My Lords, as appears from the case stated by the Commissioners for Special Purposes of the Income Tax Acts, the only question on this appeal is whether the appellant is liable to income tax in respect of a sum of 45,000*l.* paid to him by a private limited company carrying on business as builders and contractors in which he was a director. The Crown contended that this was a profit arising from the office of director within Sch. E of the Income Tax Act, 1918. The Commissioners discharged an assessment based on that view. On appeal Lawrence J. held that the Commissioners' determination was erroneous. The Court of Appeal (Finlay and Luxmoore L.JJ., the Master of the Rolls dissenting) affirmed the decision of Lawrence J. The appellant appeals to this House.

The material facts cannot be better stated than they were by Lawrence J. He said: "The appellant had been for "many years a director of a company of builders and "contractors. Towards the end of the year 1934, he had "intimated to his fellow directors his intention of resigning, "as he was entitled to do under art. 107 of the company's "articles of association. The other directors then wrote to "him a letter of December 17, 1934, in which, after having "considered his recent intimation that he intended forthwith "to determine his directorship, they asked him, in the interests "of the company, not to serve such notice; and they said "that, in consideration of his acceding to this request, the "company would, within a certain time, pay him the sum of "45,000*l.*, and would embody their undertaking so to do in a "formal deed. Then on December 31, 1934, the company "entered into the deed, which recited that the company, in "the circumstances set out in the letter of December 17, 1934, "had for the consideration therein specified, agreed to make "the appellant the payments thereinafter set out, that is to "say 35,000*l* and 10,000*l.*

" The Commissioners have held that the appellant received "the sum of 45,000*l.* for the consideration expressed in the "letter of December 17, 1934, and embodied in the deed "of December 31, 1934. They state that they accept the "deed as genuine; and find that the conditions contained "therein had been carried out."

The deed of December 31, 1934, between the company and the appellant, omitting parties and formal parts, was in these terms: " Whereas Mr. Cameron is a director of the company.

" And whereas the company in the circumstances set out "in the letter hereunto annexed has for the consideration "therein specified agreed to make to Mr. Cameron the payments "hereinafter set out and it is hereby agreed between the "parties that the company shall pay to Mr. Cameron the "following sums on the following dates: On December 31, "1934, the sum of 35,000*l.* and on March 31, 1935, the sum of "10,000*l.*

"In witness," etc.

The letter annexed was the letter of December 17 above referred to.

On these facts and findings, the question is whether the 45,000*l.* was paid to the appellant in his capacity as a director and to induce him to continue to hold his office of a director, so that the sum comes within the charging words of r. 1, of Sch. E, " all salaries, fees, wages, perquisites or profits "whatsoever therefrom " (that is, from the office of a director), or whether the sum was paid merely to obtain his agreement not to serve the notice for, say, one day, leaving him perfectly free to retire on the next day, in which case the sum, as the Master of the Rolls held, would not be a profit arising from the office.

The Master of the Rolls in his dissenting judgment, to which I have given the most anxious consideration, seems to have thought the case was in effect decided by the findings in the special case. He observed: " The crucial finding of "the Commissioners is as follows: ' We held that the "' respondent [the present appellant] received the sum of "' 45,000*l.* for the consideration expressed in the said letter

"' dated December 17, 1934, and embodied in the deed made "' December 31, 1934. We accept the deed as genuine and "' find that the conditions contained therein have been carried "' out.' This finding we are not entitled to question nor "are we entitled to say that in substance it means something "different to what it says." And a little later he remarks: "The contract did not impose upon the appellant any "obligation to act as a director. It is true that so long as "he refrained from serving a notice he remained as a director, "but this was a by-product of his undertaking, not to serve "the notice, not the performance of that undertaking." With the greatest respect to the Master of the Rolls, I cannot agree. If the finding of the Commissioners is taken literally, I see no reason to quarrel with it; but if it is to be taken as meaning what the Master of the Rolls appears to extract from the finding, I am compelled to differ. Inferences from facts stated by the Commissioners are matters of law and can be questioned on appeal. The same remark is true as to the construction of documents. If Commissioners state the evidence and hold upon that evidence that certain results follow, it is open to the Court to differ from such a holding. I agree with the remarks of Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley* (1), and also with those of Lord Atkinson in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (2)

On the facts found by the Commissioners I should come to the conclusion that the sum of 45,000*l.* was paid to the appellant by his co-directors, acting for the company, to induce him to continue to serve the company as a director for at least a reasonable time. That was not, I think, a by-product of his undertaking not to serve the notice, but the real and plain meaning of the undertaking. An agreement by the appellant not to resign his office is precisely similar to an agreement to continue to act as a director. His co-directors must be presumed to be honest men making payment of a large sum in the interest of the company and its shareholders. I hesitate to stigmatize the transaction involved in the payment, if it is to be regarded as really meaning that the

(1) [1908] 2 K. B. 89, 95.

(2) [1915] A. C. 433, 449.

appellant could have given a notice to retire within a few minutes after he received the 45,000*l.*, if not before. We must interpret the findings of the Commissioners in the light of common sense and common knowledge. Apart from this view, I think the inference which I have drawn from the findings is a matter of law, based to a large extent on the well-known law relating to directors of a limited company and to their inability to make presents out of the funds of the company to a brother director, or to pay him substantial sums for a clearly nominal consideration. Further, it is important to notice that there was a contemporaneous agreement on the part of the appellant to remain as a director at a salary of 400*l.* per annum. This circumstance seems to me to afford strong corroboration of the view which Lawrence J. and Finlay and Luxmoore L.JJ. have taken of the transaction.

If a sum is paid by a company to a man who has long been and still is a director of the company and whose services are greatly valued, and if the consideration is that he will not resign but will continue to act as a director, I cannot myself doubt that in such a case the sum is a profit of his office and that it is liable to tax, and none the less that the time during which he will continue to be a director is not fixed. This is the view of the appellant's agreement with the company taken by Finlay L.J. and by Luxmoore L.J. in affirming the judgment of the trial judge; and I agree with their decision and the reasons they have given for it.

I ought to add that in my opinion the case of *Hunter* v. *Dewhurst* (1), is distinguishable from the present case. It was a curious case and occasioned a good deal of diversity of judicial opinion; but in my view it turned on the unusual circumstance that Commander Dewhurst had only to resign his office as director to become immediately entitled under art. 109 of the company's articles to a sum exceeding 10,000*l.*, whilst if he did not resign but remained a director at 250*l.* a year for any length of time (as suggested) he would forfeit far the greater part of the sum payable under art. 109. In these circumstances it was held by a bare majority in this

(1) 16 Tax Cas. 605.

House that the sum of 10,000*l.* was paid to Commander Dewhurst to obtain a release of his right to a greater sum under art. 109. On this view it was not paid as "wages, "perquisites or profits" derived from his office of director. I do not think this case throws any light on the nature of the payment of 45,000*l.* to the appellant.

For the above reasons I am of opinion that this appeal should be dismissed with costs.

LORD RUSSELL OF KILLOWEN (read by LORD ROMER). My Lords, in my opinion the order of the Court of Appeal should be affirmed.

The question is whether the sum of 45,000*l.* which was paid to Mr. Cameron was a profit from his directorship. I feel no doubt, upon the facts of this case, that it was. It was paid to him in his capacity of a director and as a consideration for his agreeing not to cease giving his services as a director to the company, an agreement which, as Luxmoore L.J. pointed out, necessarily involves an agreement to continue to render those services. Money paid as a consideration for such a bargain appears to me clearly a profit from his directorship.

It is said that he was at liberty to determine his directorship immediately he had received the 45,000*l.*, because he had merely agreed to refrain, at a particular time, from serving a notice to end his directorship. I do not agree. He would have been bound to serve for a reasonable time, the length of which would be judged on a consideration of all relevant circumstances, including the large amount of the sum paid. The other view imputes to the directors that they paid away this large sum for nothing; in other words, that they made a present to their co-director, a thing which neither they nor the company would have any right to do.

It is further said that my view involves a departure from, or a contradiction of, the Commissioners' findings: but that is not the case. Their finding is merely that the deed means what it says, and is not a cloak for some different transaction. But what the deed says is a question of construction, and I have indicated what, in my opinion, it means and involves.

The case is not covered or governed by the decision in *Dewhurst's* case. (1) The grounds for that decision so far as they are to be found in the speeches of Lord Atkin and Lord Thankerton were that the transaction was the compromise of a money claim against the company by the acceptance of a smaller sum. It bears no resemblance to the present case.

Finally it was suggested that the moneys paid to Mr. Cameron were in the nature of capital payments: but for this I can see no foundation except the size of the sum involved. That feature alone is no justification for the suggestion.

LORD WRIGHT. My Lords, r. 1 of the Rules applicable to Sch. E is expressed in very wide terms. The tax is imposed "in respect of all salaries, fees, wages, perquisites or profits "whatsoever" from the particular office of profit, which in this case is the appellant's directorship. The language thus includes casual or extraordinary profits, whatever their size. These wide terms would naturally seem to include the 45,000*l.* in question, which was paid to the appellant as a director in the past and at the time, and for continuing to be a director, or what is the same thing, for not resigning his directorship. In my opinion this was the true nature of the payment, and therefore the substance of the transaction. The consideration was correctly and sufficiently expressed in the deed and in the letter which it incorporated. It was there stated that it was in the interests of the company that the appellant should accede to the company's request not to serve a notice of resignation. It is clear that the directors thought it worth while in the interests of the company to pay 45,000*l.* to the appellant to secure the continuance of his services as director. I cannot think that the payment was not a profit from his directorship even though it was a payment on a generous scale and not based on any particular estimate of the company's earnings. It was in fact an extraordinary payment to secure what the company presumably thought was an adequate advantage, namely, that the appellant should continue as director and not cease to serve as such. It is said that the consideration was nugatory because it was limited to the mere obligation of the appellant not to resign at that moment, so that he would not have broken it by resigning next day. The company, however, were dealing with a man who had served their interests faithfully for over forty years, and was not likely to play them a scurvy trick merely because he was generously treated. But as a matter of law I do not agree that the appellant would not have been breaking his promise if he had resigned next day. His promise, I think, should be construed as a promise not to resign for a reasonable period. Similarly, under his contemporaneous agreement to serve in an advisory capacity at 400*l.* a year, which in my opinion was an integral part of the transaction, I think it was implied that he would so serve for a reasonable period. It seems to me that the company paid the 45,000*l.* to the appellant as an extra remuneration to him for continuing as a director, and he received it on that same footing. In my judgment it fell within the category of " profits whatsoever " of his directorship. This conclusion follows in law from the facts stated.

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(1) 16 Tax Cas. 605.

It was somewhat faintly suggested that the sum was capital not income. I think this contention is untenable. I fail to see what ground there is for that suggestion. The mere fact that the sum is large is not in itself ground.

I have not found any help from *Dewhurst's* case (1) which whatever it decides is on different facts. It is difficult to elicit any principle from the majority decision of the House. Lord Warrington expressly decided it on its special facts. Lord Atkin and Lord Thankerton based their decision, as I understand it, on the ground that the money paid was not a profit from the directorship but the compromise of a future and contingent liability to pay a lump sum on the cessation of his office. Lord Dunedin and Lord Macmillan, who agreed with the Court of Appeal, thought that the payment had the quality of deferred pay and was referable to the terms of the original engagement and was a profit of the directorship.

(1) 16 Tax Cas. 605.

In any event the decision as I have said turned on different facts and furnishes no principle which helps in the present case.

In my opinion the appeal should be dismissed.

LORD ROMER. My Lords, the question to be determined in this case lies within a narrow compass. It can be stated quite shortly as follows: Was the 45,000*l.* paid to the appellant as the consideration for a promise on his part to continue the performance of his services as a director of the company? If this question be answered in the affirmative the appeal must fail. For the sum would in that case clearly be part of the "salaries, fees, wages, perquisities or profits" from the appellant's office of director within the meaning of r. 1 of the Rules applicable to Sch. E of the Income Tax Act, 1918. It matters not that the sum is a lump sum payable at once instead of being spread over a number of years, and depending in no way upon the number of years already spent or to be spent in the future by the appellant in the office. Nor does it matter that the sum is so large as to present the appearance of a capital rather than an income payment. If a company chooses to pay a director's remuneration in a lump sum it can, no doubt, lawfully do so. But the sum nevertheless represents income whatever its amount, and will be taxable as such. Remuneration which, if paid by instalments over a number of years, would be income, is income though paid once and for all in a lump sum; just as much as the capital consideration for a sale (say) of land is capital even though payable by instalments spread over a number of years.

My Lords, turning now to the question that I have stated above, I confess that to my mind it admits of only one answer, whether one considers the deed of December 31, 1934, and the letter of December 17, 1934, annexed thereto alone, or whether one considers, as forming part of the same transaction, the deed, the letter, and the minute of the resolution passed at the board meeting of December 31, 1934, together. Taking the deed first, it will be seen that the consideration for the agreement by the company to pay the 45,000*l.* is expressly stated to be that specified in the letter, and the consideration specified in the letter is the acceding by the appellant to the request of the company not to serve a notice exercising his right under art. 107 of the company's articles of forthwith determining his directorship. This surely makes it as plain as language can do that in consideration of the payment of 45,000*l.* the appellant will not determine his directorship; in other words, for it means precisely the same thing, that he will continue to act as a director. It was submitted on behalf of the appellant that this conclusion as to the consideration moving from him for the company's agreement to pay the 45,000*l.* in effect reverses and disregards findings of fact by the Special Commissioners by which every appellate tribunal was bound. The findings referred to were in the words following: " We hold that the respondent received the sum "of 45,000*l.* for the consideration expressed in the said letter "dated December 17, 1934, and embodied in the said deed "made December 31, 1934. We accept the deed as genuine. ". . . ." But the conclusion I have arrived at as to the true nature of the consideration in no way impugns the genuineness of the deed, and is in truth founded upon the language of the deed and letter and nothing else. I merely differ from the Commissioners as to the proper construction of that language, and, as pointed out by Luxmoore L.J., its proper construction is not a question of fact but of law.

In my judgment, therefore, the case of the appellant fails even if the deed and the letter are looked at without reference to the minute of December 31, 1934. It is plain, however, that the resolution recorded in the minute must have formed part of the arrangement come to between the appellant and the company and cannot in this connection be disregarded. For the deed and letter by themselves would lead to the conclusion that the duties and yearly remuneration of the appellant as a director were to be as theretofore. The minutes, however, show quite plainly that this was not so and that the deed and letter do not record the whole of the terms of the arrangement then being made. When all three documents are read, as they should be read, together, the arrangement made becomes quite clear. In consideration of the payment of 45,000*l.*, the appellant agreed to continue to act as a director in an advisory capacity at the reduced remuneration of 400*l.* per annum as from December 31, 1934.

For how long he was to continue so to act is not specified. But his fellow directors were no doubt willing to trust to his honour not to resign his directorship unless by reason of ill-health or some such material change of existing conditions he should be compelled to do so. In any case it would be an implied term of his agreement that he should continue to act for a reasonable time.

It only remains to say a word or two about *Dewhurst's* case (1) upon which the appellant placed great reliance. It is sufficient to say that the agreement which their Lordships had to consider in that case was in many respects different from the agreement in the present one. The case laid down no principle of construction and can, therefore, have no conceivable bearing upon the question of construction with which your Lordships are now concerned.

For these reasons, which are substantially the same as those given by Finlay and Luxmoore L.JJ. in the Court of Appeal, I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Edell & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 16 Tax Cas. 605.

[HOUSE OF LORDS.]

H. L. (Sc.)*

1940

Jan. 22, 23; Mar. 19.

EDINBURGH COLLIERIES COMPANY, LIMITED . . . . APPELLANTS;

AND

ROBERT FLOCKHART . . . . . . RESPONDENT.

Workmen's compensation—Medical referee's certificate—Incapacity stated to be due partly to accident and partly to other causes—Apportionment by medical referee—Competency—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9.

Where upon a reference to a medical referee under the Workmen's Compensation Act the workman's impaired condition is found to be due partly to an accident arising out of and in the course of his employment and partly to extraneous causes, it is the duty of the medical referee to certify for what employment the workman would be fit if the only deterioration in his physical condition is that caused by the accident. In such a case what the arbitrator requires to know from the medical referee is whether the "incapacity" of the workman is due in whole or in part to the accident giving rise to the claim, and the medical referee's certificate must make this plain so that the arbitrator may determine whether or not the compensation is to be assessed on the basis of the workman's total incapacity for his pre-accident employment, as being due to the accident. Further, in proper cases the medical referee's certificate should specify for what alternative employment the workman's condition fits him.

Buchanan v. *Manor Powis Coal Co., Ld.*, 1939 S. C. 193 approved.

Decision of Court of Session, 1939 S. C. 52 affirmed.

APPEAL from a decision of the Second Division of the Court of Session. (1)

The appellant workman claimed an award against the respondents of 1*l*. 1*s*. weekly, commencing the first payment as on March 15, 1937, in respect of personal injury sustained by him on March 5, 1936, by accident arising out of and in the course of his employment.

At first the appellant received compensation as for total incapacity and thereafter at the rate of 1*l*. 1*s*. in respect of

(1) 1939 S. C. 52.

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* *Present:* VISCOUNT CALDECOTE L.C., LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

partial incapacity. He opposed an application by the respondents for a reduction of the compensation to 6*s*. per week as from March 8, 1937, on which date the respondents had made an application for a medical reference, alleging that the appellant had recovered and was fit for his ordinary work and that any disability from which he might be suffering was not due to the accident. Thereupon the Sheriff-Clerk Depute referred the matter to the medical referee who was directed " to examine the said claimant and give his certificate "as to the condition of the said claimant and his fitness for "employment, stating whether the claimant has wholly or "partially recovered from the injury by accident or scheduled "disease and specifying if necessary the kind of employment "for which he is fit; and whether or to what extent the "incapacity of the said claimant is due to the accident or "scheduled disease."

On March 19, 1937, the medical referee reported as follows: "In accordance with the reference made to me . . . . I have ". . . . examined Robert Flockhart and I hereby certify that "(1.) the condition of the said Robert Flockhart is as follows: "He has markedly improved since April 16, 1936, and is fit "for any form of surface work. (2.) The incapacity of the "said Robert Flockhart is largely due to his own mental "attitude . . . ."

On March 31, 1937, the arbitrator made a remit to the medical referee in these terms: ". . . . The Sheriff-Substitute "having considered the application for a reference to a medical "referee, and the certificate of the medical referee following "thereon, dated March 19, 1937, on the motion of the "respondents' solicitor, and on consent of counsel for the "claimant, remits to the medical referee to state specifically, "by way of amending his said certificate or by way of "supplementary report, (*a*) as regards head (1.) of the "certificate, whether the claimant has wholly or partially "recovered from the injury by accident, and (*b*) as regards "head (2.) of the certificate, whether the incapacity due to "the accident has ceased, or to what extent, if any, the "incapacity of the claimant is due to the accident."

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The medical referee thereupon gave an amended certificate dated March 19, 1937, as follows: "I hereby certify that "(1.) the condition of the said Robert Flockhart is as follows: "He has markedly improved since April 16, 1936, and is fit "for any form of surface work. He has not yet wholly "recovered. (2.) The incapacity . . . . is largely due to his "own mental attitude. 25 per cent. of his incapacity is due "to his accident."

Following on that certificate the respondents offered the claimant compensation of 6*s.* per week in respect of partial incapacity, but this was refused by the workman who claimed 1*l.* 1*s.* per week as from March 8, 1937, when the employers had ceased payment of compensation. The claimant averred that his average weekly earnings at the time of the accident were 3*l.* 18*s.* 2*d.*, and that he was now able to earn, at suitable employment, not more than 1*l.* 16*s.* per week. The Sheriff-Substitute stated a case asking whether he should have allowed a proof as to these allegations. That question the Court of Session answered in the negative, whereupon the case came again before the Sheriff-Substitute, who by his award assessed the compensation payable to the claimant at 6*s.* per week as from March 8, 1937.

The questions of law for the opinion of the Court of Session were (1.) on the facts was the Sheriff-Substitute entitled to reduce the claimant's compensation? and (2.) was he entitled, in assessing the compensation, to make the computation solely on the basis of 25 per cent. of incapacity referred to in the medical referee's certificate?

The Second Division held (diss. Lord Mackay, dub. Lord Wark) that the fact that the workmen's physical incapacity was only partly due to the accident did not necessarily mean that the incapacity so caused was not sufficient in itself to account for his defect in wage-earning capacity, and, accordingly, that the arbitrator must assess compensation in the light of a further report from the medical referee on the question whether the 25 per cent. of the incapacity due to the accident would or would not of itself prevent the workman doing any other than surface work; and the case was accordingly remitted to the arbitrator with a direction to re-remit to the medical referee.

The employers appealed.

A. G. Erskine Hill K.C. and *Allan G. Walker* for the appellants. The medical referee's certificate is complete and unambiguous. It was competent for him to decide the workman's wage-earning capacity in the way he did, and his certificate cannot be questioned: *Wilsons and Clyde Coal Co., Ld.* v. *Burrows* (1); *M'Allister* v. *Addie* (*Robert*) *& Sons Collieries, Ld.* (2); the only way to give effect to its terms being to quantify the amount of compensation in the way stated by the medical referee. On the assumption that the question was properly before him there was nothing to preclude him from answering in the way he did. As was pointed out by Lord Atkin in *M'Allister* v. *Addie & Sons Collieries, Ld.* (3): "If at the "time of the examination (by the medical referee) the injury "has ceased to cause any wage-earning incapacity or the "possibility of its renewal, it cannot be disputed that com-"pensation should be ended. Can it make any difference "that at the time of the examination there was incapacity "due to an independent cause, such as illness or a domestic "accident?"

[Lord Romer. The medical referee has to certify to what extent the incapacity is due to the accident.]

In *Buchanan* v. *Manor Powis Coal Co., Ld.* (4), and in the present case the Court of Session has failed to give due effect to what the medical referee has rightly done in endeavouring to convey to the Court a definite idea of the condition of the workman.

T. A. Gentles K.C. and *Gordon Stott* for the respondent were not called upon.

The House took time for consideration.

1940. March 19. Viscount Caldecote L.C. This appeal from a judgment of the Second Division of the Court of Session raises a question of some general importance under the Workmen's Compensation Act, 1925. The facts material to a decision of that question are as follows:—

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(1) [1929] A. C. 651.
(2) [1937] W. N. 79; 1937 S. C. (H. L.) 9.
(3) 1937 S. C. (H. L.) 9, 14.
(4) 1939 S. C. 193.

On March 5, 1936, the respondent Robert Flockhart, who was employed as a machineman in one of the collieries of the appellants, met with an accident arising out of and in the course of his employment. The accident caused an injury to his right arm and a nervous shock, with the result that he was for a time totally incapacitated, and was paid compensation by the appellants on that footing. On April 13, 1936, at the instance of the appellants, a reference was made to the medical referee in pursuance of the provisions of s. 19, sub-s. 2, of the said Act. On April 16, 1936, however, the medical referee certified that the respondent was unfit for work, and the appellants accordingly continued to pay compensation as for total incapacity down to July 30, 1936, on which date the respondent was given light work, and was thereafter, by agreement between the parties, paid compensation as for partial incapacity at the rate of 1*l.* 1*s.* a week. These payments continued to be made until March 8, 1937, when the appellants, alleging that the respondent had wholly recovered from the injury caused by the accident, made another application for a reference to the medical referee. The Sheriff-Clerk Depute in due course made the reference, and following the form prescribed by para. 15 (2.) of the Act of Sederunt of March 16, 1926, and Form IV. in the Appendix thereto as amended by Act of Sederunt of February 28, 1933, directed the medical referee "to examine the said claimant and "give his certificate as to the condition of the said claimant "and his fitness for employment, stating whether the claimant "has wholly or partially recovered from the injury by accident "or scheduled disease and specifying if necessary the kind "of employment for which he is fit; and whether or to what "extent the incapacity of the said claimant is due to the "accident or scheduled disease." In purported compliance with this direction the medical referee, on March 19, 1937, certified that the respondent had markedly improved since

April 16, 1936, and was "fit for any form of surface work," and that his "incapacity" was "largely due to his own mental "attitude."

This was not very helpful; and accordingly on March 31, 1937, the Sheriff-Substitute remitted the matter to the medical referee to amend his certificate by stating specifically (*a*) whether the respondent had wholly or partially recovered from the injury by accident, and (*b*) whether the incapacity due to the accident had ceased or to what extent, if any, the incapacity of the respondent was due to the accident. The medical referee thereupon amended his certificate by the addition of the following findings about the respondent: (1.) "He has not yet wholly recovered"; (2.) "25 per cent. "of his incapacity is due to his accident."

These amendments to the certificate having been made, the case was again brought on before the Sheriff-Substitute. It then appeared that the respondent was desirous of adducing evidence to show that his mental attitude to which the referee had said the incapacity of the respondent was largely due was itself the result of the accident. The Sheriff-Substitute decided to allow proof of this. The appellants objected, and the Sheriff-Substitute stated a case for the opinion of the Court upon the question of law whether a proof should be allowed. By the unanimous decision of the Second Division of the Court of Session the question was answered in the negative. It was held that in asking that proof should be allowed the respondent was seeking to challenge the certificate upon a finding as to which it was made conclusive evidence by s. 19, sub-s. 3, of the Act. This decision is not and cannot be challenged. It was unquestionably right. The only reason it has been mentioned here is because of certain observations made by the Lord Justice-Clerk in his opinion which have a bearing upon the questions arising on the present appeal. He said this: "it was argued on behalf of the employers that the "medical referee having determined the incapacity of the "workman due to the accident to be 25 per cent., all that "remained to be done was to translate that finding of physical "incapacity into terms of wage-earning incapacity. I cannot

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"agree with that view. I think there may well be a case "where a man's physical incapacity due to an accident is "only 25 per cent. where his wage-earning incapacity due to "the accident may be 50 per cent. or even more." Further on he added: "I can conceive it being maintained that, while "the medical referee has said that 25 per cent. of the workman's "incapacity is due to the accident, it is not altogether clear "whether his incapacity to work underground would result "from the accident disability by itself. If any difficulty of "that kind should arise, then nothing we are deciding now will "foreclose the arbitrator from making a further remit to the "medical referee to clear up any ambiguity. That is a very "different thing from allowing a proof." The determination of the Sheriff-Substitute to admit a proof was therefore recalled and the case was remitted to him to proceed.

In conformity with this remit the matter again came before the Sheriff-Substitute, who on February 1, 1938, made an award in favour of the respondent of 6*s.* a week from March 8, 1937. It was conceded that his weekly earnings before the accident were 3*l.* 18*s.* 2*d.*, and that he was able to earn in a suitable employment not more than 1*l.* 16*s.* a week. Treating the difference between these two sums as being 2*l.* 2*s.*, the respondent claimed that under s. 9, sub-s. 3 (I.), of the Act he was entitled to a continuance of the payment of 1*l.* 1*s.* a week which the appellants had been paying him up to March 8, 1937. The Sheriff-Substitute, however, was of the opinion that, in view of the finding of the medical referee that only 25 per cent. of his incapacity was due to the accident, the respondent was only entitled to 25 per cent. of the 1*l.* 1*s.* But the appellants had offered to pay 6*s.* a week, and so 6*s.* a week was awarded.

At the request of the respondent the Sheriff-Substitute than stated a case for the opinion of the Court in which he stated the foregoing facts and submitted for their decision two questions of law in the following terms:—

"(1.) On the facts stated, was I entitled to reduce the "claimant's compensation?

"(2.) On the facts stated, was I entitled in assessing the

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"amount of compensation due to the claimant to make the "computation solely on the basis of the 25 per cent. of "incapacity referred to in the medical referee's certificate ?"

After some adjournments the stated case ultimately came on for hearing before the Lord Justice-Clerk, Lord Mackay, Lord Wark, and Lord Pitman. In the result their Lordships were of opinion (Lord Mackay dissenting, and Lord Wark concurring with some hesitation) that the certificate of the medical referee was too ambiguous to form the basis of an award of compensation. The Lord Justice-Clerk said : "What "one really wants to know is whether the accident injury "causing the 25 per cent. of the incapacity would by itself "prevent the appellant from working underground—in other "words, is the accident disability sufficient to rule out for the "appellant all work except surface work ? This appears to be "left uncertain on the certificate as it stands. I am disposed "to read it as meaning that the accident injury does prevent "the appellant doing his former work as a machineman, but "it ought to be made clear, and not left to speculation, what "work the accident injury permits the appellant to do, and "what work it prevents him from doing. The certificate, as "it stands, throws no sufficient light upon that matter. And, "until it is expiscated, I do not think the arbitrator has proper "material for his assessment." The Lord Justice-Clerk concluded his judgment as follows : "On receiving the medical "referee's report the arbitrator will then consider the assessment de novo, keeping in view that the material question "is what is the workman able to earn in employment suitable "to his condition as affected by the accident ?" An interlocutor was accordingly pronounced, of which the material part is as follows :

"Answer the first and second questions of law in hoc statu "in the negative ; recall the determination of the arbitrator "and remit back to him under direction to re-remit to the "medical referee with the following reference : 'The medical "'referee having found by his amended certificate dated "'March 19, 1937, that Robert Flockhart, the claimant, is "'fit for any form of surface work and that he is not yet "'wholly recovered, and that his incapacity is largely due to "'his own mental attitude, and that 25 per cent. of his "'incapacity is due to the accident, to state whether in the "'opinion of the medical referee the 25 per cent. of the "'incapacity due to the accident would or would not of itself "'be sufficient to prevent the appellant doing any work other "'than surface work; and to add any explanation he may "'think necessary as to the sense in which the percentage "'finding of his certificate is to be read'."

It would seem from this narrative of the circumstances in which the appeal comes before you that the only question for decision is whether the certificate of the medical referee is in its present form too ambiguous for the arbitrator to decide what compensation, if any, is payable to the respondent. That was the question decided by the Court of Session, and it is against that decision that the appellants now appeal.

The provisions of the Workmen's Compensation Act concerning medical examination, and particularly concerning the function of a medical referee, play an important part in the scheme of the Act. The certificate of the medical referee is conclusive evidence as to the matters it certifies. He is the final authority as to the condition of the workman and his fitness for employment, but he is not charged with the duty of assessing the compensation which is payable in the light of his findings. That is the function of the arbitrator. In a straightforward case where a total or partial loss of wage-earning power, referred to in ss. 12 and 19 of the Act as "incapacity," is the result only of the injury due to the accident, the medical referee will certify accordingly and the arbitrator will have no difficulty in making his award. But cases will arise, and this case is one of them, where other causes intervene so as to increase or prolong the workman's incapacity. What the arbitrator requires to know is whether the "incapacity" is due in whole or in part to the accident, and the medical referee must make this plain. That is just what the medical referee here seems to me not to have done. He has found a percentage of the workman's total incapacity to be due to the accident. If I am to be left to surmise, I should understand that to mean that the workman's state of ill-health is to the extent of the percentage due to the accident. If that is the meaning of the certificate, the medical referee seems, in so far as I understand his finding, to have left out of consideration the possibility that the workman's incapacity due to his accident might be quite enough to cause the unfitness for work underground. If, on the other hand, the medical referee is taken to be dealing with loss of earning capacity, I am quite unable to appreciate the meaning of the percentage assessment, unless it is an invasion of the sphere of the duties of the arbitrator.

It is not surprising that in these circumstances the arbitrator went wrong, as I think he did. He has applied automatically the medical referee's quantification of the workman's "incapacity," in whatever sense that word was intended by the medical referee to be used, so as to determine the amount of compensation payable. So much is plain, as the Lord Justice-Clerk points out, from the very form of the second question stated by the arbitrator. In my opinion the arbitrator was wrong in treating the medical referee's certificate as justification for the view that the workman was entitled to be paid compensation in respect of only 25 per cent. of his incapacity to earn his former wage. The fact is that the arbitrator had not the material on which he could properly base his award, and I therefore agree with the Court of Session that the questions to be answered by the medical referee should be remitted in the form stated by the Lord Justice-Clerk.

I think this view is in accordance with the decision of a Court of seven judges of the Court of Session in *Buchanan* v. *Manor Powis Coal Co.* (1) We were invited to say that that decision was wrong. The Court there, with Lord Mackay dissenting, overruled the unreported case of *Taylor* v. *Smith.* (2) In the last-mentioned case approval was given by the Second Division of the Court of Session to an assessment by the arbitrator, which was arrived at by a process similar to that used in the present case. The Lord Justice-Clerk, in his

(1) 1939 S. C. 193.

(2) Unreported: decided Feb. 25, 1934.

judgment under appeal, has said that it was not intended in *Taylor* v. *Smith* (1) to lay down any general proposition. It is sufficient to say that, in my opinion, *Buchanan* v. *Manor Powis Coal Co.* (2) was rightly decided, and correctly lays down the principles according to which the arbitrator and the medical referee should discharge their respective functions.

This appeal should, in my opinion, be dismissed with costs.

Lord Wright. I agree with the opinion which has been delivered by my noble and learned friend, the Lord Chancellor. I also agree with the majority judgments delivered in *Buchanan* v. *Manor Powis Coal Co.* (2), a case where questions arose similar to those in the present case as to the sufficiency of a medical referee's certificate and where also a remit was ordered. In *Buchanan's* case (2) I have found the judgment of the Lord President, who delivered the judgment of the consulted judges, complete and convincing, and it is supported by the judgments of the Lord Justice-Clerk and Lord Wark. In *Buchanan's* case (2) the Court were in a position to overrule, and did overrule, the decision in the unreported case of *Taylor* v. *Smith* (1), by which the Court found itself embarrassed in the case now under appeal, and dealt with by holding that it did not lay down any general principle. I agree that it was wrongly decided and I think that it has now been rightly overruled. In my opinion the procedure approved in *Taylor* v. *Smith* (1) was not in accordance with the clear provisions of s. 9 (dealing with assessment of compensation by the arbitrator), or s. 19, sub-ss. 3 and 4 (defining the duties and functions of the medical referee and defining what he must certify). As the Lord President observes in *Buchanan's* case (2): "No light is "shed on the problem of assessing compensation by a certificate "that total incapacity falls to be divided in certain percentages "between the incapacity caused by the injury by accident and "the other independent but concurrent disability. The work-"man cannot suffer more than a hundred per cent. incapacity, "but the incapacity caused by each of the concurrent but

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(1) Unreported.

(2) 1939 S. C. 193.

"independent physical conditions may amount to a hundred "per cent." It is therefore essential that the medical referee's certificate should give the necessary information to enable the arbitrator to determine whether or not the compensation is to be assessed on the basis of the man's total incapacity for his pre-accident employment, as being due to the accident, and that it should also, in proper cases, specify for what alternative employment the man's condition fits him, adding where necessary whether or to what extent the incapacity of the workman is due to the accident. It is then for the arbitrator to decide on all the material before him, including the medical referee's certificate, which is conclusive as to the matters which he is to certify, what under s. 9 is the proper compensation for the total or partial incapacity for work which results from the accident. Experience as recorded in the authorities has shown that many and varied problems may have to be considered by the arbitrator in making the assessment of compensation.

I concur in the motion proposed.

LORD ROMER. The question to be determined upon this appeal is whether the Court of Session were right in deciding that the certificate of the medical referee in its present form is too ambiguous to enable the Sheriff-Substitute to ascertain what compensation (if any) is payable by the appellants to the respondent since March 8, 1937, for that was the only question actually decided by the Court in the interlocutor now appealed from.

The certificate as amended after the remit of March 31, 1937, contains two findings that are quite unambiguous and create no difficulty. They are (1.) that the respondent has not wholly recovered from the injury caused by the accident ; (2.) that he is fit for any form of surface work. The first of these two findings relates to the physical condition of the respondent. The second relates to a working or wage-earning incapacity on his part ; for it obviously contains by implication a finding that he is not fit for underground work. But the certificate also contains, in effect, a finding that the "incapacity" of the respondent is due as to 25 per cent. to the accident, and as to 75 per cent. to a mental attitude of his which is due in no way to the accident. It is this finding that causes the whole difficulty; and this is due to the fact that the medical referee has not done what he was required to do by s. 19, sub-s. 4, of the Workman's Compensation Act, 1925, and the reference made to him in accordance with Form IV. of the Appendix to the Act of Sederunt of February 28, 1933. That this is so is manifest when the relevant provisions of the Act are examined.

By s. 1, sub-s. 1, of the Act it is provided that where personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer shall, subject as thereinafter mentioned, be liable to pay compensation in accordance with the provisions thereinafter contained. The sub-section, it will be seen, embraces every case where personal injury results from the accident, that is to say, every case where the accident has resulted in the physical condition of the workman being deteriorated. But when "the provisions "thereinafter contained" relating to the compensation are looked at, it is found that it is only payable where the deterioration in the physical condition results in a total or partial incapacity for work, which means a total or partial loss of the workman's wage-earning capacity. It is of the greatest importance in questions arising under the Workman's Compensation Act to bear in mind the difference between physical incapacity on the one hand and wage-earning incapacity on the other; for it will, I believe, be found that the word "incapacity" is used in the latter sense throughout the Act. It is, at any rate, in that sense that the word is used in ss. 9, 12 and 19, sub-s. 4, and this is sufficient for my purpose.

Turning to s. 9, sub-s. 1, it will be seen that the compensation when fixed in accordance with the section is to be a weekly payment "during the incapacity," which clearly means so long as the particular wage-earning incapacity due to the accident, with reference to which the compensation has been fixed, shall not have come to an end. Indeed, as appears from s. 12, the payment of this compensation can only be ended, and the amount of it can only be reduced, either by agreement or in pursuance of an arbitration or in the events specified in sub-ss. 1, 2 and 3. It is worth while observing that the events specified in sub-ss. 1 and 2 of this section are both events in which the particular wage-earning incapacity just referred to has been shown to have determined—in sub-s. 1 by the workman's return to work, in sub-s. 2 by his earning higher wages. More important, however, for the present purpose is the provision in sub-s. 3 that the certificate of the medical practitioner which will enable the employer on taking the steps therein specified to end or diminish a weekly payment must state either that the workman has wholly or partially recovered or that his incapacity is no longer due in whole or in part to the accident. It is plain from this that if the incapacity to earn wages be due even in part to the accident, the payments cannot be ended or diminished under the sub-section, although an extraneous event may have occurred since the accident which of itself would be sufficient to produce a like incapacity. And this is in accordance with the provision in s. 9, sub-s. 1, that the payment shall continue during the incapacity.

But, whatever may be the steps taken by the employer with a view to ending the weekly payments, it is possible that a point will be reached at which the employer and the workman are unable to agree as to the physical condition of the workman and the fitness of the latter for employment having regard to that condition. In such a case the Sheriff-Clerk or the Sheriff, as the case may be, can, on proper application being made, refer the matter to a medical referee to certify as to the workman's condition and his fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by accident and specifying, if necessary, the kind of employment for which he is fit. This is the effect of sub-ss. 2 and 3 of s. 19, and the Act of Sederunt of March 16, 1926, as amended by the Act of Sederunt of February 28, 1933. Should the medical referee thereupon certify that the workman has wholly recovered from the injury by accident, no difficulty can arise whatever may be the physical condition of the workman due to other causes. Nor can there be any difficulty should the referee certify that the workman has only partially recovered, so long as his physical condition has not been impaired by some extraneous cause. In such a case the effect of the injury on his pre-accident wage-earning capacity can be easily ascertained, inasmuch as any diminution in such capacity that may properly be taken into account will be due to the accident, and the accident alone. But there may be cases where the workman's impaired physical condition may be suspected to be due partly to the accident and partly to some extraneous cause, or wholly due to one of those causes alone. In such a case the reference to the medical referee will, under the provision in that behalf contained in s. 19, sub-s. 4, include a reference of the question whether or to what extent the incapacity is due to the accident. "Incapacity" in this connection clearly means wage-earning incapacity; for the sub-section enacts that where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident the provisions of the section shall apply "as if the question were a "question as to the condition of the workman."

Now where upon such a reference being made the medical referee finds that the deterioration in the workman's physical condition is due to both causes, it is in my opinion the duty of the referee to certify what employment the workman would be fit for if the only deterioration in his physical condition were that caused by the accident. It is here that, in my judgment, the medical referee has erred in the present case. He has certified, as I understand his report, that the physical condition of the respondent is such that he cannot work underground, but is fit for any form of surface work; and that his incapacity is due as to 25 per cent. to the accident and 75 per cent. to his own mental attitude. But in the first place it is not clear whether by the word "incapacity" the referee intends to refer to deterioration in the workman's pre-accident physical condition or to deterioration in his pre-accident wage-earning power. If he is referring to the former, his finding is of no use to anybody. He has not done what he was asked to do.

If he is referring to the latter, it is, with all respect to him, quite meaningless. For he has measured the loss of wage-earning capacity due to the accident by the numerical ratio that it bears to a loss of wage-earning capacity treated as being due to the accident and the mental attitude combined; and except in the unusual circumstances referred to hereafter such a measurement can never really indicate the loss of capacity due to the accident alone. This can readily be shown by a few illustrations. Suppose that a workman loses an eye by an accident arising out of and in the course of his employment and, becoming thereby totally incapacitated for work, receives compensation upon that footing. Suppose that after a time he loses the other eye by an accident not so arising. His physical condition is now one of total blindness, and can properly be said to be due as to 50 per cent. to the first accident and as to 50 per cent. to the second. But the wage-earning incapacity due to the first accident has in no way been altered by the second. It would be quite wrong to reduce his compensation by 50 per cent., or at all, on the ground that after the second accident only 50 per cent., or any percentage less than 100, was due to the first accident. This was in effect decided, and in my respectful opinion rightly decided, by the Court of Session in *Buchanan's* case (1), overruling the unreported case of *Taylor* v. *Smith*. (2) But now consider the case where the first accident causes total incapacity and the second by itself would only cause partial incapacity; or the case where the first causes partial and the second by itself would cause total incapacity. In both cases the incapacity after the second accident is total. But this total incapacity in the former case is caused solely by the first accident and in the latter case is caused solely by the second. In the former case the compensation being paid to the workman cannot be reduced, and in the latter case it cannot be increased, by any reference to some numerical ratio supposed to exist between the two incapacities. The only incapacity that matters for the purpose of this Act is the incapacity due to the accident, and in order to answer the question "Whether or to what extent the "incapacity of the workman is due to the accident" the medical referee must certify what work if any the workman would be capable of doing if the only deterioration in his

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(1) 1939 S. C. 193.

(2) Unreported.

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physical condition had been that occasioned by the accident and without reference to that due to extraneous causes. The question can never properly be answered by attributing to the accident a percentage of blame for the workman's existing physical condition, or, except in certain unusual circumstances, by attributing to the accident a percentage of a wage-earning incapacity supposed to exist as a result of the accident and some extraneous cause combined.

The unusual circumstances to which I have referred would exist if neither the accident nor the extraneous cause would of itself cause incapacity but would cause it when combined. In those circumstances it might be possible for the medical referee to assign a percentage of the incapacity to each cause. But whether he could ever properly assign anything but 50 per cent. to each cause, or what would be the result of such a finding, are questions upon which I do not find it necessary to express any opinion. The questions may never arise in practice. It will be time to answer them if and when they do.

For these reasons I am of opinion that the majority in the Court of Session arrived at the right conclusion, and that this appeal should be dismissed with costs.

Viscount Caldecote L.C. I am desired by my noble and learned friend Lord Russell of Killowen to say that he concurs in the opinions which have been pronounced.

Appeal dismissed.

Solicitors for appellants: *Beveridge & Co., for W. & J. Burness, W.S., Edinburgh,* and *J. A. McAra, Glasgow.*

Solicitors for respondent: *H. S. L. Polak & Co., for W. Steele Nicoll & Co., S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

NOBLE . . . . APPELLANTS; H. L. (E.)*

AND

SOUTHERN RAILWAY COMPANY . . RESPONDENTS.

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Mar. 5, 6, 7;
April 18.

Workmen's compensation—Railway employee—Proceeding to work by prohibited route—Workman killed by passing train—Sphere of employment—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 2.

The appellant's husband, who was in the respondent company's service as a "passed fireman," was attached to the locomotive depot at Norwood Junction. On the night of August 25, 1938, he was instructed to go to East Croydon to carry out duties there. To get to East Croydon he would have to walk from the locomotive depot to Norwood Junction and then proceed by train to East Croydon. The respondent company had issued to its staff, including the appellant's husband, a book of rules, one of which was in these terms: "Employees are expressly prohibited from "walking upon the line or crossing the rails (except at a public "level crossing) unless they are required to do so in the execution "of their duty or are proceeding to or from their work by a route "permitted by the company. Any employee walking upon the "line or crossing the rails except as aforesaid, will be acting "outside his employment." On the night in question the appellant's husband took the route, which was somewhat shorter, along the line, and was killed by an electric train. On a claim for compensation by the deceased's widow:—

Held, that as there was nothing to show that the deceased had deviated from the safe route in order to fulfil any purpose of his own, that as he was still on the respondents' premises and was going about his allotted job, the necessary inference was that he was walking along the line "for the purposes of and in connection "with his employers' trade or business," and that therefore the applicant was entitled, under s. 1, sub-s. 2, of the Workmen's Compensation Act, 1925, to recover compensation.

Clarke v. *Southern Ry. Co.* (1927) 20 B. W. C. C. 309 overruled. Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

On August 25, 1938, the appellant's husband was knocked down and killed by an electric train on the respondents' railway. The deceased man was in the respondents' service

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

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as a "passed fireman," but was still graded as a fireman. He was attached to the locomotive depot at Norwood Junction, and on the night of August 24–25, 1938, he reported for duty at that junction, and was instructed to go to East Croydon to carry out pilotage duties there. To get to East Croydon it was necessary for him to walk from the locomotive depot to the station at Norwood Junction, and from there to proceed as a passenger by train to East Croydon. The company had issued a blue book to each member of its staff, and one such was issued to the deceased, one of the rules in this being in these terms: "Employees are expressly prohibited from "walking upon the line or crossing the rails (except at a public "level crossing) unless they are required to do so in the execution "of their duty or are proceeding to or from their work by a "route permitted by the company. Any employee walking "upon the line or crossing the rails, except as aforesaid, will be "acting outside his employment." On the night in question the deceased took the direct route along the rails, and was killed by an electric train coming up behind him. From the award subsequently made, it was quite clear that when the deceased was killed he had departed from the recognized and safe route, and was walking along the highly dangerous route between or in close proximity to the rails used by electric trains, and in that sense was in a place where the respondents had expressly forbidden him to be.

On a claim for compensation by the present appellant, the deceased's widow, the county court judge made his award in favour of the respondents, and his award was affirmed by the Court of Appeal, which held itself bound by its previous decision in *Clarke* v. *Southern Ry. Co.* (1), where the facts were indistinguishable from those in the present case.

The widow appealed to this House.

F. W. Beney and *Neil Lawson* for the appellant. The question is whether what the deceased man was doing when he was run down and killed must be deemed to have arisen out of and in the course of his employment within s. 1, sub-s. 2, of the Workmen's Compensation Act, 1925. (1) The Court of Appeal held itself bound by the decision in *Clarke* v. *Southern Ry. Co.* (2) to decide against the appellant's claim. That case cannot, however, be regarded as good law in view of the decisions of this House in *Thomas* v. *Ocean Coal Co.* (3); *Victoria Spinning Co.* (*Rochdale*), *Ld.* v. *Matthews* (4); and *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (5) The right test was that laid down by Romer L.J. in *Privett* v. *Darracq Motor Engineering Co., Ld.* (6), where he said (7) "You "are, first of all, to ascertain whether looking at the evidence "as a whole and disregarding the prohibition, statutory or "otherwise, that rendered the act an improper act on the part "of the workman, the workman was engaged in doing something that was within the scope of his employment. If he "was not, then sub-s. 2 will not avail him. If he was, then by "virtue of sub-s. 2 it is no longer open to the employer to say: "Yes, but now look at this prohibition, and the effect of that "prohibition is to take the act outside the scope of the man's "employment. The sub-section says that notwithstanding "the prohibition, which otherwise would have taken the act "outside the scope of the man's employment, the accident is "to be deemed to have occurred in the course of and arising out "of the employment." As was said also by Atkin L.J. in *Stokoe* v. *Mickley Coal Co., Ld.* (8), "it seems . . . . to be a "very narrow and a very wrong view to say that because the "man violates the prohibition in order to save himself trouble,

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(1) (1927) 20 B. W. C. C. 309.

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(1) Workmen's Compensation Act, 1925, s. 1, sub-s. 2: "For "the purposes of this Act, an "accident resulting in the death "or serious and permanent dis- "ablement of a workman shall be "deemed to arise out of and in the "course of his employment, not- "withstanding that the workman "was at the time when the "accident happened acting in con- "travention of any statutory or "other regulation applicable to "his employment, or of any orders "given by or on behalf of his "employer, or that he was acting "without instructions from his "employer, if such act was done "by the workman for the purposes "of and in connection with his "employer's trade or business."

(2) (1927) 20 B. W. C. C. 309.

(3) [1933] A. C. 100.

(4) (1936) 29 B. W. C. C. 242, 247; 52 Times L. R. 708.

(5) [1939] A. C. 71.

(6) (1934) 27 B. W. C. C. 163.

(7) Ibid. 175.

(8) (1928) 21 B. W. C. C. 70, 81.

"therefore he is not acting for the purposes of his employers' "business and in connection with it; when he is doing the "act he is acting entirely for the purposes of his employers' "business and obviously in connection with it." That also states precisely the principle applicable in this case. In such circumstances as those now in question, "the accident," as Lord Dunedin said in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (1), "is to be deemed to have arisen out of the employ-"ment notwithstanding the prohibition." In *Evans* v. *Powell Duffryn Associated Collieries, Ld.* (2), the workman went into a forbidden area and was killed, but it was held that as what he did was for the purposes of and in connection with the employers' trade or business, the accident must be deemed to have arisen out of and in the course of the employment within sub-s. 2. In *Clarke* v. *Southern Ry. Co.* (3) we submit that Lord Hanworth M.R., misapprehended the effect of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (1), and used the prohibition in the case before him to delimit the sphere of the workman's employment. That was too narrow a view to take of the effect of s. 1, sub-s. 2. In *Knowles* v. *Southern Ry. Co.* (4), the workman's act was not within the scope of his employment, as he had not got back to the van of which he had been in charge before he met with the accident.

A. T. Denning K.C. and *W. H. Duckworth* for the respondents. The railway lines at the spot where the accident happened are all electrically worked and there is a conductor rail which is a source of great danger to persons who may trespass on the line. Moreover, at night the conductor rail may not be visible. There was, therefore, good reason for the prohibition against persons walking along the line; and in the absence of any emergency—and there was none here—a fireman had no more business to be on the permanent way than a booking clerk would have, especially on an electrified line. That being the nature of the place where the accident occurred, and the nature of the deceased's employment, we submit that taking the route he did he was quite outside the scope of his

(1) [1926] A. C. 377, 388.
(2) (1938) 31 B. W. C. C. 229.
(3) 20 B. W. C. C. 309.
(4) [1937] A. C. 463.

employment, and it would be an odd result if an employer who, careful for the safety of his workmen, makes a rule designed to secure that end, should be in a worse position than one who took no precautions. In the words of Lord Dunedin in *Kerr* v. *Baird & Co.* (1), the workman in this case as in that "was "arrogating to himself duties which he was neither engaged, "nor entitled, to perform." In *Hendry* v. *United Collieries, Ld.* (2), there were two routes from the mine, one dangerous, the other safe. The Court of Session held that a miner who chose the dangerous route was outside his employment. In *M'Laren* v. *Caledonian Ry. Co.* (3), where an employee who chose to walk along the railway line, which was forbidden, and was killed, it was held that while the accident arose in the course of the employment, it did not arise "out of the "employment." Here the deceased, to use the expression of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co., Ld.* (4), "went into a territory with which he had nothing to do," or, as it was put in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (5), the deceased was exposing himself to an added peril and was not acting within the sphere of his employment. See also per Viscount Cave in *Bourton* v. *Beauchamp* (6), where he said: "There is a substantial difference between doing carelessly or "recklessly a thing which you are employed to do, and doing a "thing which you are not employed or entitled to do at all. "The former risk is undertaken by the employer in cases "falling within the statute; the latter is a peril added by the "workman and not within the contemplation of the parties "to the contract of employment." See also to the same effect *Stephen* v. *Cooper.* (7) *Clarke* v. *Southern Ry. Co.* (8) was rightly decided and should be followed. If the deceased's work had been to attend to the points and the like the accident would have been within the Act; he went where he did for his own purposes and not for those of the employers, having been told to travel by the route indicated; but he superinduced a peril and therefore was outside the Act.

(1) 1911 S. C. 701, 704.
(2) 1910 S. C. 709.
(3) 1911 S. C. 1075.
(4) [1914] A. C. 62, 68.
(5) [1917] A. C. 352.
(6) [1920] A. C. 1001, 1006.
(7) [1929] A. C. 570.
(8) 20 B. W. C. C. 309.

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F. W. Beney replied.

The House took time for consideration.

1940. April 18. VISCOUNT MAUGHAM. My Lords, the husband of the appellant, Thomas Noble, was killed on August 25, 1938, by an electric train. He was in the employment of the respondents as a "passed fireman," but he was still graded as a fireman. Noble, who was thirty-seven years old, had been attached to the locomotive depot at Norwood Junction since March, 1936, and he was, in fact, employed on "piloting "duties," meaning that when a driver was not acquainted with the railroad, he had to travel in the engine cab and show it to him.

About midnight of August 24, 1938, he reported at the engine shed, part of the locomotive depot, and was then told to go to East Croydon, travelling as a passenger from Norwood Junction Station by a train due to leave at 12.25 A.M. To catch that train he had to walk to the Junction Station. There is a recognized route to that place which has been specified as the right way since the locomotive depot was opened in July, 1925. It is along a footpath on the respondents' property, then over a footbridge on to another footpath, then along Penge Road, over Goat House Bridge, along the High Street, Portland Road, and a further footpath. This somewhat devious route is adequately lighted at night and is almost perfectly safe. The total distance is 1002 yards. There is, however, a short cut along the lines of the railway, the total distance of which is 841 yards. This direct route is dangerous because of the presence of point rods, elevated live rails, various obstructions and electric trains passing in both directions. It is very dangerous at night as it is not lighted. Its use by employees of the respondents (unless they are required to use it in the execution of their duty) is strictly prohibited. Moreover, a notice had been issued specifying the exact route which had to be taken between the Junction Station and the locomotive depot.

Thomas Noble unhappily took the direct route along the rails and he was killed at 12.14 or 12.15 by an electric train coming up behind him. The night was a dark one. He was struck at a point 242 yards from the locomotive shed and was carried along the track to a point 312 yards from the shed, and at that point his body was recovered. The award makes it quite clear that when he was killed he had departed from the recognized and safe route and was walking along the highly dangerous route between or in close proximity to the rails used by the electric trains. In that sense he was in a place where the respondents had expressly forbidden him to go. In order to appreciate the problem before your Lordships, it is necessary to state that the workman was doing a prohibited act, involving an added risk, in a place where he was by the prohibition forbidden to go.

The learned arbitrator in his award has made a clear and exhaustive statement of the relevant facts. Unfortunately he appears—and if I may say so, very naturally—to have lost his way a little in the jungle of decisions on the construction and effect of s. 1, sub-s. 2, of the Workmen's Compensation Act, 1925. Moreover, a decision of the Court of Appeal in the case of *Clarke* v. *Southern Ry. Co.* (1), the facts of which were really indistinguishable from those of the present case, compelled him, as I think, to hold that sub-s. 2 of s. 1 did not avail the workman. His award was accordingly in favour of the respondents. In the Court of Appeal MacKinnon L.J. and Luxmoore L.J., with some reluctance, came to the conclusion that they were bound by the decision in *Clarke's* case (1), while Macnaghten J. also thought that, according to the award, the appellant had failed to prove that Noble went along the permanent way where he was killed for any purpose of the respondents. I will return to this question of fact later on.

My Lords, there are over fifty decisions which deal with problems very similar to the one with which we are dealing, including not less than ten decisions of this House. We are, of course, bound by the latter so far as they decide questions as to the construction of the Act of Parliament, but there are dicta, sometimes difficult to reconcile, by which we are not bound. It must also be remembered that each case depends

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(1) 20 B. W. C. C. 309.

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on the findings of the arbitrator which are binding unless it is shown that he has misdirected himself in some material matter or unless there is no evidence to justify his finding. For my part I am very reluctant to go outside the terms of s. 1 of the Act, with this exception, that I think the history of sub-s. 2 must be borne in mind. That history is to be found stated in this House in the case of *Thomas* v. *Ocean Coal Co.* (1); and I will not repeat it. It is plain that the object of s. 7 of the Act of 1923 (which was in the same language as sub-s. 2 of s. 1 of the Act of 1925) was to enable workmen and their dependants to obtain compensation in the case of injuries resulting in death or serious and permanent disablement (but not in other cases) although they would have failed to do so according to the decision of this House in *Moore (A. G.) & Co.* v. *Donnelly*. (2) The method adopted by the Legislature was not to alter the ruling in *Donnelly's* case (2), but to provide that in certain cases the accident shall be *deemed to have arisen* out of and in the course of the workman's employment. If this is so the result is to make the employer liable under s. 1, subject only to the proviso which we need not consider in this case. Sub-s. 2 merely provides an artificial extension of the actual scope of employment of the workman in the particular circumstances mentioned and subject to the special condition that the act which was being done at the time of the accident was done for the purposes of and in connection with—not the workman's job, but—his employer's trade or business. In saying this I am only repeating in my own words what Lord Dunedin stated in *M'Aulay* v. *Dunlop (Jas.) & Co., Ld.* (3) The sub-section has, I think, no application unless the workman when the accident happened was acting in contravention "of any statutory or other "regulation applicable to his employment or of any orders given "by or on behalf of his employer, or that he was acting without "instructions from his employer" (a phrase which for brevity I shall describe as " regulations or orders "). This is clear from the history of the sub-section and from the use of the word " notwithstanding " which in its context explains the object of

(1) [1933] A. C. 100, 124, 127.
(2) [1921] 1 A. C. 329.
(3) [1926] A. C. 377, 386, 387.

it. I may perhaps add here that I agree with Lord Dunedin's explanation of the words relating to the man "acting without "instructions from his employer," namely, that they were meant to apply to a case where it might be argued that the prohibition was an implied prohibition: see *M'Aulay* v. *Dunlop (Jas.) & Co., Ld.* (1)

In my opinion we are compelled by the section in such a case as the present where death has resulted from the accident and no serious and wilful misconduct is alleged, to answer the following questions:—

First, looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment?

Secondly, if the first question is answered in the negative, is the negative answer due to the fact that when the accident happened the workman was acting in contravention of some regulation or order?

Thirdly, if the second question is answered in the affirmative, was the act which the workman was engaged in performing done by the workman for the purposes of and in connection with his employer's trade or business?

My Lords, in the light of the recent decisions of this House it seems to be clear that there are no tests of universal application which will give material assistance in answering these questions of fact—questions which ought, of course, to be answered in the award.

What has been described as the doctrine of "added peril" was I think not the ratio decidendi in any decision of this House. I agree with what Lord Buckmaster said about it in the case of *Thomas* v. *Ocean Coal Co.* (2), as explained by my noble and learned friend Lord Russell of Killowen in *Victoria Spinning Co. (Rochdale), Ld.* v. *Matthews.* (3) Originally designed as a test for the scope or sphere of the employment, the doctrine seems sometimes to have been used for a wider purpose. It may be of use as a test in some cases, but for my part I think it will be misleading in others. It is plain that

(1) [1926] A. C. 377, 386, 387.
(2) [1933] A. C. 100, 109.
(3) 29 B. W. C. C. 242, 247.

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many, perhaps most, of the regulations and orders applicable to a man's employment are designed simply to prevent added perils being occasioned to him and his fellow-workmen in that employment. Yet it is clear that if the case comes within sub-s. 2 the man will be entitled to compensation notwithstanding the added risk which the man has run by his disobedience. That obviously is the very object of the sub-section in the case of death or serious and permanent disablement being caused by the accident. For this reason it is, I think, clear that the "added peril" test is quite inapplicable to sub-s. 2; in my opinion it is only useful in its application to sub-s. 1 if it is a matter of doubt whether a particular act is or is not within a man's employment. In such a case the circumstance that the act in question involves an added peril may help to the conclusion that the act was not intended to be within the scope of the man's employment. I do not think that Lord Sumner meant anything more than this in the oft-quoted statement from *Lancashire and Yorkshire Ry.* v. *Highley.* (1) I will add on this point that I agree in all respects with the speech of my noble and learned friend Lord Atkin in *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (2)

I venture to add a comment on the proposition that in answering the question whether sub-s. 2 applies, the test is whether if there had been no regulation forbidding what the man did, the act would have been due to an accident arising out of and in the course of his employment. I think this test is a useful one provided that the regulation is only a prohibition as to an act which but for the prohibition would be within the scope of the man's employment. The regulation, however, may be one limiting the scope or sphere of the man's employment, or it may be a regulation with both effects, and in those cases the result of wholly disregarding it will be to alter the contract between the employer and the workman—which cannot be intended. Thus, suppose that there is a regulation stating that men engaged to clean certain machines are not to set them in motion. If a man engaged as a cleaner does an act outside his job by setting a machine in motion, he will not,

(1) [1917] A. C. 352, 372.

(2) [1939] A. C. 71, 78, 79.

speaking generally, be entitled to the benefit of sub-s. 2 merely because there is a prohibition against his doing so: *Wilsons and Clyde Coal Co.* v. *M'Ferrin.* (1)

My Lords, on the facts found by the learned arbitrator, the answers to the three questions I have formulated must be as follows: First, the accident did not arise out of the employment. The man was given a safe route but chose to take one which was prohibited because of its dangers: *Moore (A. G.) & Co.* v. *Donnelly.* (2)

Secondly, the answer to the first question is solely due to the circumstance that the accident to the workman occurred on his employers' premises while he was contravening the regulations as to his proper route from the engine house to the station. The prohibited route was along the railway line of the respondents and it was clearly prohibited merely because of its danger to a man who in the course of his duty is going from the engine house to the station or in the reverse direction. In these circumstances the test above referred to can properly be applied—if there were no prohibition would the act have been one which arose out of and in the course of the man's employment? The answer must be in the affirmative.

The third question must also, I think, be answered in the affirmative. I cannot think that the county court judge rejected this view, as Macnaghten J. thought. It is true that there was no emergency, but it seems to me impossible to believe or reasonably to conjecture that the man was walking along the line a little after midnight on a dark night in the direction of the Junction Station for any other purpose than to catch the 12.25 A.M. train to East Croydon. The facts are found in the award. The man had entered upon his employment at the engine shed. He was told to go to the station for the purpose of getting on to the 12.25 train. He was killed shortly after leaving the shed on the railway lines of the respondents whilst going by the most direct (though a prohibited) route to the station. There is no suggestion that he deviated from the safe route to fulfil any purpose of his own. He was still on the respondents' premises and was going about

(1) [1926] 1 A. C. 377.

(2) [1921] 1 A. C. 329.

his allotted job. The necessary inference is that he was walking along the line "for the purposes of and in connection "with his employer's trade or business." The learned arbitrator seems to have come to an opposite conclusion as the result of a desire to follow a statement by Lord Atkin in the case of *Davies* v. *Gwaun-cae-Gurwen Colliery Co.* (1) The statement was perfectly correct, if I may say so, on the facts of that case; but it was not intended to lay down any general rule as regards prohibited areas.

If the views above expressed are correct it must follow that the decision in the case of *Clarke* v. *Southern Ry. Co.* (2) is erroneous and cannot be relied on.

My Lords, I have hesitated on the question whether the case ought not to be remitted to the arbitrator for findings on the questions which I have defined above or some similar questions which your Lordships might approve; but on the whole I think that he has found all the facts which are necessary for deciding the matter, and that we ought not to shrink in the circumstances from deciding whether these facts entitled the appellant to succeed or not. On the fullest consideration I am of opinion that the case comes within the terms of sub-s. 2 of s. 1 of the Act, that the accident must be deemed to have arisen out of and in the course of his employment, and that the appellant is therefore entitled to succeed on this appeal.

For these reasons the judgment of the Court of Appeal should be reversed and the award set aside. The matter must be remitted to the arbitrator, unless the parties agree, for the purpose of fixing the amount of the compensation.

Lord Atkin. My Lords, this is another case illustrating the difficulties which have been occasioned in the course of the working of the Workmen's Compensation Act in giving effect to sub-s. 2 of s. 1 of the Act. There can be no doubt that the sub-section when introduced as s. 7 of the Act of 1923 was intended to be, and still remains, a provision giving important and extended relief to workmen as compared with that to which they had been held to be entitled under the then existing legislation. The extent of the new relief given had to be determined by the Courts, and must be taken to be defined by the decision of this House in 1926 in *Wilsons and Clyde Coal Co.* v. *M'Ferrin.* (1) Whether that decision construed the section as favourably for the workmen as the Legislature may have intended is not now a subject for judicial discussion. It is authoritative and as in duty bound I accept it. The effect of the decision seems to be that in ascertaining whether a workman is entitled to the benefit of the sub-section you still have to consider whether he was acting within the scope of his employment, but for that purpose you are to ignore the regulations or orders in contravention of which he was acting. If apart from them you discern his employment you must decide in respect of that employment whether the accident arose out of and in the course of it. I personally do not find this very easy. I find it difficult to abstract from the definition of the employment all the regulations and orders made or given in respect of it, contravention of any one of which is ex hypothesi to be ignored. And I find this all the more difficult when I find that prohibitions which before 1923 were held to be prohibitions limiting the scope of the employment, as in *Moore (A. G.) & Co.* v. *Donnelly* (2), are amongst those to be ignored: see *Wilsons and Clyde Coal Co.* v. *M'Ferrin.* (3) I must therefore ignore, at any rate, some scope limiting regulations. No doubt that is why, by the section, the accident is not said to arise in the course of employment, but is deemed so to arise. Moreover, the effect of scope limiting regulations on the ascertainment of the scope of the employment still seems to survive in cases not falling within the section, which only applies in cases of death or serious and permanent disablement. It would appear therefore that in little injuries you are to give full effect to the scope limiting regulations: in big injuries you disregard them or some of them if they have been contravened, and it is deemed that they do not limit the scope of the employment. It seems to follow from this that to ascertain the scope of the employment you may still take into account the whole body of regulations and orders that affect the employment, but if serious injury results from the contravention of one of them while the workman is acting for the purpose of and in connection with his employers' business, the scope of the employment is deemed to be extended. I also think that notwithstanding the prohibition and its contravention, and altogether disregarding the prohibition, it may be possible to show that the injured workman was injured outside his employment. The guard is not employed as engine driver, and if injured while driving the train would prima facie not have suffered injury arising out of and in the course of his employment, even though the employers had made an express regulation that no guard was to drive an engine. I except cases of emergency where the duty may be considered to be extended. Similarly a packer in the warehouse would not be employed as a weaver, whether or no there was a prohibition against his acting as such. Now in the present case, ignoring as I think is right the prohibition contained in rule 15, what is there to indicate that the deceased workman Noble was not injured while acting within the scope of his employment? He was a fireman; he had reached his place of work, the engine shed; he had received orders to proceed to the station to catch a train which would take him to his working job; in obedience to the orders he was walking to the station: everything happened in regular course of employment except that he was proceeding by a route forbidden him by the prohibition. I am not clear from the judgment of the learned county court judge whether he meant to decide that the man was not acting for the purposes of his employers' business. It is to my mind quite clear that he was and that there was no evidence to the contrary. I wish to affirm the decision in *Stokoe* v. *Mickley Coal Co.* (1) that in such cases the motive with which the man was acting is irrelevant. Few men disobey a prohibition except for the reason that they find it irksome, and that it is more convenient for them to disregard it. If motive in this sense negatived the condition, the section might as well never have been passed. I come to the

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(1) [1924] 2 K. B. 651, 665.

(2) 20 B. W. C. C. 309.

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(1) [1926] A. C. 377.

(2) [1921] 1 A. C. 329.

(3) [1926] A. C. 377, 388.

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(1) (1928) 21 B. W. C. C. 70.

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conclusion therefore that the only evidence in the case establishes that the man was acting for the purposes of and in connection with his employers' trade and business and that in the circumstances the accident must be deemed to arise out of and in the course of his employment. I have not thought it necessary to deal with the numerous cases referred to in argument. The county court judge had twenty cases cited to him, we had sixty; I suppose with a due sense of proportion the Court of Appeal had forty. I venture to think that the more recent decisions have made many of the earlier ones useless for the purpose of construing this section, and I agree with Goddard L.J. in *Seviour* v. *Somerset Collieries* (1) that *Thomas* v. *Ocean Coal Co., Ld.* (2), is a landmark in this branch of the law. It appears to me to cover this case, and together with *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (3), and *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (4), which deals with the associated subject of negligence, affords authority which should be sufficient to determine most of the problems that arise in connection with this section. It is apparent that earlier decisions on the section must be read in the light of these cases. I doubt, for instance, whether I could adhere to some of the remarks I made in my own judgment in *Davies* v. *Gwauncaegurwen Colliery Co.* (5), one of the earliest pronouncements of the Courts on the section when introduced in 1923. The decision in *Clarke* v. *Southern Ry. Co.* (6), which was treated rather reluctantly by the majority of the Court of Appeal as binding on them, is inconsistent with the recent cases and must now be treated as overruled. Since this case was argued the case of *Seviour* v. *Somerset Collieries* (1) referred to above has been reported in the Court of Appeal. It was very similar to this, and the judgment of Slesser L.J. appears to me to be convincing. I think that the appeal should be allowed, and the case remitted to the learned county court judge for him to make an award for the admitted amount of compensation.

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(1) (1940) 56 Times L. R. 437.
(2) [1933] A. C. 100.
(3) [1926] A. C. 377.
(4) [1939] A. C. 71.
(5) [1924] 2 K. B. 651.
(6) 20 B. W. C. C. 309.

Lord Wright. My Lords, I do not imagine that your Lordships would ever have been troubled with this case if it had not been for the decision of the Court of Appeal in *Clarke* v. *Southern Ry. Co.* (1) In that case the facts were in no material respect distinguishable from the present. The man was actually injured by slipping as he jumped on a moving engine, but on the facts the county court judge held that the attempt to board the engine did not affect his claim. But he was injured when contravening the very order to proceed by a particular route, which the deceased man was contravening in the present case. The county court judge in *Clarke's* case (1) showed a just appreciation of the law as laid down in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2), and held on the facts which he found that the man though contravening an order was doing the work for which he was employed and was acting for the purposes of and in connection with his employer's trade or business. On these findings the case fell within s. 1, sub-ss. 1 and 2, of the Act. The accident arose out of and in the course of the employment, save in the one respect that the man was contravening an order of his employers, but under s. 7 of the Act of 1923, now sub-s. 2 of s. 1 of the Act of 1925, as the accident resulted in serious disablement it was deemed so to arise, subject to the condition which was found to have been fulfilled. On the judge's findings the case fell precisely within the ruling of *M'Ferrin's* case (2) and the judge properly so held. His decision was, however, overruled by the Court of Appeal, not on the facts, which it was not competent to the Court to question, but, so far as I can understand, on grounds completely inconsistent with what this House decided in *M'Ferrin's* case. (2) I feel no doubt that the decision of the Court of Appeal was wrong. I can understand the difficulty in which both the county court judge and the Court of Appeal were placed in the present case. What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by this House and refuse to follow the erroneous decision. But I cannot

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(1) 20 B. W. C. C. 309. (2) [1926] A. C. 377.

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blame the Court of Appeal for leaving it to this House to point out that the decision in *Clarke's* case (1) was at the time inconsistent with *M'Ferrin's* case (2), and is also inconsistent with what this House said later in *Thomas* v. *Ocean Coal Co.* (3) and *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (4) It is enough here to say that *Clarke's* case (1) was wrongly decided. Indeed the contrary is unarguable. Judgment in the present case, therefore, should be entered for the appellant. There are two points on which I have felt any question. One was the absence in the county court judge's statement of the facts of any express finding that Noble was acting for the purposes of and in connection with the employer's trade or business. But on the facts it is clear that he was doing so. In proceeding to East Croydon station he was doing what his employment required him to do. His motive, in the narrower sense of the immediate urge in choosing to go by the prohibited route is immaterial, whether it was to save time or to save himself trouble. The test is objective and depends on the fact that his proceeding to the station was within the sphere of his employment. The case is thus precisely within the language of Lord Dunedin in *M'Ferrin's* case (5): "The "only reason for saying that the accident did not arise out "of the employment was .... that the prohibition .... made "it clear that what the workman was doing was not within "the scope of his employment, but that is precisely the case "for the application of s. 7" [now sub-s. 2 of s. 1 of the Act of 1925]. "The accident is to be deemed to have arisen out "of the employment notwithstanding the prohibition." As it is in my opinion impossible on the facts of this case to arrive at any conclusion other than that the man was proceeding for the purposes of and in connection with his employer's trade or business, I do not think any importance can be attached to the absence of a finding on the part of the county court judge. Then there is the question whether the case should not be remitted to the county court judge to reconsider his decision

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(1) 20 B. W. C. C. 309.
(2) [1926] A. C. 377.
(3) [1933] A. C. 100.
(4) [1939] A. C. 71.
(5) [1926] A. C. 377, 388.

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in the light of the ruling of this House. I think it is not obligatory to do so. The facts are free from dispute and I am of opinion that the precedent established under similar circumstances in *Thomas* v. *Ocean Coal Co.* (1) should be followed. This House there took upon itself the responsibility of deciding whether the case fell within the statute, and the same course should be followed in this appeal. I apprehend that the amount of compensation is not likely to be in dispute. If it is, the county court judge must decide what it is.

This case seems to me to be so clearly within the principles established by this House in *M'Ferrin's* case (2), and again in *Thomas* v. *Ocean Coal Co.* (1), that I find it hard to realize how some days were spent in the arguments, and as my noble and learned friend Lord Atkin has pointed out, no less than sixty authorities were cited. I cannot remember how many authorities were cited in *Thomas* v. *Ocean Coal Co.* (1), but I feel no doubt a great number were cited in argument. Yet in the end, and perhaps earlier, it was clear that *M'Ferrin's* case (2) concluded the matter, and here it is doubly clear that the matter is concluded by these decisions of the House. I have, along with the other Lords who took part in the debate, said all that I can usefully say on the question in *Thomas* v. *Ocean Coal Co.* (1) and on the more general kindred question of the construction of the Act in the *Harris* case. (3) If I attempt to repeat myself I shall only again add to the number of phrases or paraphrases which have accumulated round the Act, and have furnished material for the ingenuity of advocates and the embarrassment of county court judges. I have often reflected with sadness that the Act was intended to be administered with as little technicality as possible. Yet thousands of reported cases have accumulated round it and fresh ones are likely to go on accumulating so long as the Act remains in its present form. Most of these cases in truth depend on questions of fact, yet in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4), Lord Finlay L.C. wisely observed that "a finding of fact in one case cannot be a safe guide as to a

(1) [1933] A. C. 100.
(2) [1926] A. C. 377, 388.
(3) [1939] A. C. 71.
(4) [1917] A. C. 352, 359.

"finding of fact in another case." The fundamental and initial question in every claim under the Act must be whether the accident arose out of and in the course of the employment. That is a question of fact which can only be decided by the county court judge by applying his common sense and his knowledge of industrial conditions to the evidence before him, though with due regard to any principles laid down by the Courts. When he has come to a conclusion on that point, he will, as a matter of construction of the Act, observe that the man's negligence is immaterial, a principle I hope cleared up for good and all by the decision in *Harris's* case (1), and that if the accident results in death or serious and permanent disablement the claim is not barred because the accident is attributable to serious or wilful misconduct, and he will in proper cases observe further that it is not barred if the case falls within s. 1, sub-s. 2, of the Act. But these latter questions do not need to be considered until the judge has found that the accident did arise out of and in the course of his employment.

I think it is true to say that as time has gone on the Courts have taken a fairer and more common-sense view of the circumstances which justify an affirmative finding on this point. I question if *Highley's* case (2) or *Stephen* v. *Cooper* (3) would now be decided on the facts against the claimant. In the former case the man was negligent in not seeing before he ran between the wagons that an engine was not coupled to the train, and in the latter he was negligent in not stopping the knives of the mower, when he walked along the pole to do what was necessary for the conduct of the work, namely, to refix the chain on the hook. In the latter case his manner of doing the job was grossly, even recklessly, negligent, but was it more ? In the last resort these cases seem to turn almost entirely on issues of fact. It is in general futile to argue by analogy from one case to another, though certain generalizations laid down in the authorities may need to be applied or considered in particular cases, and the decision must be based on

(1) [1939] A. C. 71.
(2) [1917] A. C. 352.
(3) [1929] A. C. 570.

the actual words of the Act and on any decisions construing them. Thus, for instance, in any similar case the arbitrator would have to apply the principles laid down in *M'Ferrin's* case (1) or in *Harris's* case. (2) Neither *Highley's* case (3) nor *Stephen* v. *Cooper* (4) is relevant in this case because neither case involved disobedience to orders or directions, or acts done without instructions. If that had been so, the rules to be applied are to be found in the decisions of this House, which I think is not so ready as it was in the past to forget that it is simply construing a statute, or to import limitations and refinements for which the words of the statute afford no justification. I feel no doubt that the action of the Legislature in denying to the Courts the power (in the case of death, etc.) to exclude a claim on the ground that the man was infringing a prohibition, and the action of this House in making it clear that the workman's negligence by adding a risk did not bar his claim so long as the accident arose out of and in the course of his employment, have done much to change the general attitude of the Courts in considering these cases. The amendment embodied in s. 7 of the Act of 1923 has had a wider influence than what it immediately enacted. Thus the view of the law stated by Lord Sumner in *Highley's* case (3) was indeed adopted by this House in *Moore (A. G.) & Co.* v. *Donnelly* (5), but when that case is seen to be overruled because of the amendment of the law by s. 7 of the Act of 1923, now s. 1, sub-s. 2, of the present Act, as explained in *M'Ferrin's* case (1), the somewhat narrow view stated by Lord Sumner can no longer be regarded as law.

I concur in the motion proposed.

Lord Porter. My Lords, I am asked by my noble and learned friend Lord Romer to say that he concurs in the opinions which your Lordships have expressed.

Lord Porter. My Lords, on August 25, 1938, the appellant's husband, Thomas Noble, was knocked down and

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(1) [1926] A. C. 377.
(2) [1939] A. C. 71.
(3) [1917] A. C. 352.
(4) [1929] A. C. 570.
(5) [1921] 1 A. C. 329.

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killed by an electric train on the respondents' railway. Thomas Noble was employed by the respondents as a "passed fireman," that is to say, he was qualified to act as a driver of a steam locomotive, but was still graded as a fireman. He had been attached to the locomotive depot at Norwood Junction since March, 1936. At the time of his death he was employed on "piloting duties," i.e., when a driver was not acquainted with the railroad, Thomas Noble was sent to accompany him and show him the way.

On the night of August 24-25, 1938, Thomas Noble had reported for duty at the engine shed of the depot at Norwood Junction about midnight. He was then instructed by the foreman to go to East Croydon and carry out piloting duties there.

In order to get to East Croydon it was necessary for him to walk from the locomotive depot to the station at Norwood Junction and from there to proceed as a passenger by train to East Croydon. After receiving his instructions he was entitled to occupy ten minutes in reading notices and thirteen minutes in walking from the depot to the station. His train started from Norwood Junction at 12.25.

It was the practice of the company to issue a blue book to each member of their staff and one such book was issued to Thomas Noble on December 6, 1932. Rule 15 in that book was in the following terms: "15. Employees are expressly "prohibited from walking upon the line or crossing the rails "(except at a public level crossing) unless they are required "to do so in the execution of their duty or are proceeding "to or from their work by a route permitted by the Company. "Any employee walking upon the line or crossing the rails, "except as aforesaid, will be acting outside his employment."

The locomotive depot at Norwood Junction was opened on July 6, 1935, and on July 5 a notice to all concerned was issued in these terms:—

"A new Locomotive Depot will be brought into use on "Saturday night, July 6, 1935.

"Enginemen and others must note that the route to be "taken is from the Up side of the Station, via:—

"Company's footpath,

"Causeway, Portland Road,
"South Norwood High Street,
"Goat House Bridge,
"Penge Road.

"West Croydon Locomotive Depot will be closed from "that date."

Apparently in spite of the instructions issued to their staff not to walk along the metals numerous accidents had occurred as a result of the breach of Rule 15 and a fresh circular was issued, again calling attention to its terms.

So far as Thomas Noble was concerned the facts appear to be that he did not follow the route indicated in the notice issued on July 5, 1935, but instead of crossing the line over the footbridge and proceeding along the footpath leading to Penge Road, he continued along the company's line and was struck by an electric train travelling in the same direction as that in which he was walking, carried for some seventy yards and killed. The accident took place at 12.14½. It was found by the county court judge that he had reasonable time to reach the station if he had proceeded by the indicated route. It appears that he left the engine shed at 12.14 and no evidence was given as to his reasons for proceeding by the railway line instead of by the prescribed route. In these circumstances the county court judge held that the appellant was not entitled to recover compensation, and this decision was affirmed by the Court of Appeal from whose judgment the present appeal is brought.

The determination of the question at issue appears to depend largely upon the true meaning of s. 1, sub-ss. 1 and 2, of the Workmen's Compensation Act, 1925. The first sub-section is too well known to require repetition. The terms of the latter sub-section read as follows: "(2.) For the purposes of "this Act, an accident resulting in the death or serious and "permanent disablement of a workman shall be deemed to "arise out of and in the course of his employment, notwith-"standing that the workman was at the time when the accident "happened acting in contravention of any statutory or other "regulation applicable to his employment, or of any orders "given by or on behalf of his employer, or that he was acting "without instructions from his employer, if such act was done "by the workman for the purposes of and in connection with "his employer's trade or business."

From that sub-section it is apparent that in order to entitle an applicant to recover, though the injury upon which reliance is placed must arise out of and in the course of the man's employment, yet in deciding whether it so arises, the fact that the workman was acting in contravention of any statutory or other regulation or of any orders of his employer or without instructions from his employer is to be neglected, that is to say, if the act would be within the scope of the man's employment but for the regulation or order or lack of instructions, it is none the less within his employment despite those regulations, orders or want of orders.

The object of this provision appears to have been to deal with the difficulties created by the decision in *Moore (A. G.) & Co.* v. *Donnelly* (1) (in which it was held that the prohibition of an act otherwise within the scope of a workman's employment might be sufficient to take it outside this scope), and to prevent the workman or his dependants losing the right to compensation merely because of the breach of such statutory or other regulation. This advantage however was only to be obtained subject to the proviso that the forbidden act must have been done for the purpose of and in connection with the employer's trade or business.

In the present case the county court judge found that the act of walking along the railway line was not within the sphere of the workman's employment, but though his language is a little obscure, he appears to have thought that in spite of the terms of s. 1, sub-s. 2, of the Act, the prohibition contained in Rule 15 could so limit the scope of the workman's employment as to make an act in contravention of it outside his employment. He said: "The prohibition in my view "placed the act of walking on the permanent way outside the "scope or sphere of his employment. If the familiar test "laid down by Lord Sumner in *Lancashire and Yorkshire Ry.*

(1) [1921] 1 A. C. 329.

"*Co.* v. *Highley* (1) were put in relation to the present "arbitration, it could not possibly be said that it was part of "Noble's employment to hazard, to suffer, or to do what "caused his injury."

He also seems to have thought that the act of walking along the metals could not in any case have been done for the purpose of and in connection with the employers' business and was therefore not within the proviso to s. 1, sub-s. 2. His words are: "His" (the workman's) "action" (in *Thomas* v. *Ocean Coal Co.* (2)) "though hazardous, was held by Lord "Buckmaster to be 'due to the man's desire to expedite the "'process he was engaged to control.' That can hardly be "said in the present case." And, "Where defined areas are "forbidden to a workman, the main current of authority is "against applying sub-s. 2. In *Davies* v. *Gwauncaegurwen* "*Colliery Co.* (3) Lord Atkin laid down that in such an area "a workman can have no business and therefore he can only "be there for his own purposes." And, "finally in *Knowles* v. "*Southern Ry. Co.* (4) Lord Russell held in most sweeping terms "that the sub-section only applies 'to acts merely incidental "'to the employment' and that where acts are expressly "forbidden they can 'by no stretch of imagination be said to "be acts 'done for the purposes of and in connection with "'the employers' business'."

The respondents' representatives recognizing, I think, that Lord Sumner's words were used before the passing of the provisions of the Workmen's Compensation Act of 1923 which were afterwards re-enacted in s. 1, sub-s. 2, of the Act of 1925, and that they could not be applied without the limitation necessitated by that Act, did not attempt to support the learned county court judge's conclusion that the prohibition prevented the act leading to the injury from being within the scope of the man's employment. They said, however, that to pass along the permanent way whether forbidden or not was no part of his duty. In the first place they contended that the route by which he was to go from shed to station was prescribed in

(1) [1917] A. C. 352, 372.
(2) [1933] A. C. 100, 110.
(3) [1924] 2 K. B. 651.
(4) [1937] A. C. 463, 472.

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the notice of July 5, 1935, and for the man to go by any other route was to leave his work and undertake a task outside its scope. If this view be true he would not be within the sphere of his employment if, instead of passing along the footpath to the west of the railway line, he had crossed by Portland Road Bridge and then walked along Clifford Road to his destination, though to do so would only be to use a route along a metal road instead of a route along a footpath. I cannot think that such a conclusion is justified or that every variation of the route prescribed, however safe, must be regarded as outside the work which he was employed to do. In my view the so-called prescribed route is not a limit outside which the man has ceased to be acting within his employment. He may indeed be acting in contravention of his master's orders, but except in this respect he is not going outside the sphere of his duties ; and if he were only acting contrary to orders, he would still be deemed to be within the sphere of his duties under the provisions of s. 1, sub-s. 2, of the Act of 1925.

But then it was said that even if he might make his way along one of the other roads without leaving his employment he was no more entitled to walk along the railway line than to engage in platelaying or other work on the permanent way. The risks which he undertook by so acting were, it was contended, not those of a "passed fireman" but those of the repairing staff. For this contention reliance was placed chiefly on the words already quoted of Lord Sumner in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1) : "There is, however, in my "opinion, one test which is always at any rate applicable, "because it arises upon the very words of the statute, and is "generally of some real assistance. It is this. Was it part "of the injured person's employment to hazard, to suffer, "or to do that which caused his injury ? " and also upon the decision in *Clarke* v. *Southern Ry. Co.* (2) But a series of cases beginning with *Barnes* v. *Nunnery Colliery Co., Ld.* (3), and ending with *Stephen* v. *Cooper* (4) were also called in aid.

In applying these decisions, however, care must be taken to differentiate between those in which it was held that a contravention of orders had taken an act which would otherwise be within a man's employment outside its scope, and those in which the act which caused the injury was not within the man's work for reasons other than that it was prohibited. Since the Workmen's Compensation Act, 1923, afterwards re-enacted in s. 1, sub-s. 2, of the Act of 1925, a mere contravention of orders is not sufficient. Some indeed of the cases quoted undoubtedly do deal with the question of the limitation of the man's employment quite apart from any contravention of orders. Even in the latter cases, however, though any determination of principle is helpful, findings of fact—even in circumstances somewhat similar to the case under consideration—are of no real assistance: each case must depend upon a careful consideration of its own facts. As Lord Dunedin said in *Plumb* v. *Cobden Flour Mills Co., Ld.* (1): "It is well, I think, in considering the cases, "which are numerous, to keep steadily in mind that the "question to be answered is always the question arising "upon the very words of the statute. It is often useful in "striving to test the facts of a particular case to express the "test in various phrases. But such phrases are merely aids "to solving the original question, and must not be allowed "to dislodge the original words. Most of the erroneous "arguments which are put before the Courts in this branch "of the law will be found to depend on disregarding this "salutary rule. A test embodied in a certain phrase is put "forward, and only put forward, by a judge in considering "the facts of the case before him. That phrase is seized on "and treated as if it afforded a conclusive test for all circum-"stances, with the result that a certain conclusion is plausibly "represented as resting upon authority, which would have "little chance of being accepted if tried by the words of the "statute itself."

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(1) [1917] A. C. 352, 372.
(2) 20 B. W. C. C. 309.
(3) [1912] A. C. 44.
(4) [1929] A. C. 570.

The distinction now to be made between cases in which s. 1, sub-s. 2, is applicable and those in which it is not, is perhaps best illustrated by the decision in *Wilsons and Clyde*

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(1) [1914] A. C. 62, 65.

Coal Co. v. *M'Ferrin* and *Kerr* v. *James Dunlop & Co.* (1), in which your Lordships' House considered the cases of two separate workmen, one of whom returned to a shothole in the mistaken belief that a shot which he had fired had exploded, and was injured. In so returning he was acting contrary to a statutory regulation but was nevertheless held entitled to recover. The other, who was a miner, coupled an electric cable to a detonator for the purpose of firing a shot. This act was also contrary to a statutory regulation, but in any case was no part of the duty of a miner. The first man recovered because the only ground for refusing compensation was that his act was prohibited ; the second failed to recover because quite apart from the prohibition he had arrogated to himself the duties of a fireman, duties which it was not his in any case to perform. Indeed, in the course of the argument before us both sides accepted the position laid down by Lord Dunedin in that case, namely, that one ought to disregard the fact that the workman at the time when he met with his accident was acting in contravention of a regulation, and to determine, without reference to that fact, whether the accident arose out of and in the course of his employment.

No doubt this question may often be a matter of some nicety and a question of degree. I can imagine an employee ordered to proceed to France at the present day arguing that he was entitled to travel by steamer or train ferry or even by air, but I should not think it permissible for him to cross by row boat or to proceed by canoe. Whether, if he had ample time, it would be permissible for him to proceed by sailing boat might be a matter of more doubt.

Since the decision in *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (2), it is plain that mere danger or even recklessness is not enough to take an act, otherwise within the scope of a man's employment, outside it. It is true that Lord Buckmaster says in *Thomas* v. *Ocean Coal Co., Ld.* (3) : "Conduct can, of course, be so reckless and so unnecessary "as to take it outside the meaning of the statute." But these words must be read in the light of his previous observations: "In one sense, every method of performing an operation "in the course of a man's employment that is not the safest "is an added peril, but the Act contains no provisions that "exclude from its benefits an accident that has arisen through "a method of work which was not the safest in the circum-"stances"; and the observations of Lord Atkinson in *Barnes* v. *Nunnery Colliery Co., Ld.* (1): "In these cases under the "Workmen's Compensation Act, a distinction must, I think, "always be drawn between the doing of a thing recklessly "or negligently which the workman is employed to do, and "the doing of a thing altogether outside and unconnected with "his employment. A peril which arises from the negligent or "reckless manner in which an employee does the work he is "employed to do may well be held in most cases rightly to be a "risk incidental to his employment. Not so in the other "case."

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(1) [1926] A. C. 377.

(2) [1939] A. C. 71.

(3) [1933] A. C. 100, 109.

Lord Buckmaster's words mean, I think, no more than that the man must be really engaged in attempting to perform his duty, not as in *Stephen* v. *Cooper* (2) engaging in a frolic of his own under the pretence of doing his master's work.

Disregarding then reg. 15, was the workman in the present case engaged on his proper work at the time of his death and did the accident arise out of his employment? He appears to me to have been so engaged. He had signed on at the depot, he had read the notices, and he was passing from one part to another of his employers' premises in the course of reaching a station from which again he was to proceed for the purpose of his work. It was not a case such as *St. Helens Colliery Co., Ld.* v. *Hewitson* (3), where the workman was proceeding homewards from his employers' premises and was six miles from them when the accident occurred. In the present case the man's work was not confined to the footplate, and he had already reached the ambit of those premises on which his employers' orders would have to be obeyed. He was not arrogating to himself some

(1) [1912] A. C. 44, 49.
(2) [1929] A. C. 570.
(3) [1924] A. C. 59.

new duty—he was engaged on his employment, however negligently or recklessly he may have been performing it.

But it is said this is not enough; the workman must fulfil not only the substance of s. 1, sub-s. 2, he must also be shown to have come within the proviso to it, i.e., he must obtain a decision from the county court judge that in disobeying the prohibition imposed upon him he was acting for the purpose of and in connection with his employer's business. No doubt it is true that his fulfilment of the proviso must be proved, and if the learned county court judge had found as a matter of fact that at the time of the accident he was not fulfilling his masters' purposes, and if the evidence supported that finding, the appellant must fail. But in the present case the learned county court judge has not, in my view, based himself upon a finding of fact, he has misdirected himself on a question of law. Perhaps this view is best exhibited in the words which he quotes from Lord Russell of Killowen in *Knowles* v. *Southern Ry. Co.* (1), which have been set out above—words which were applicable to the facts of the case then under consideration but have no application to the present case. The mistake which I think he makes is in believing that a prohibited act can in no case be said to be done for the purposes of and in connection with the employer's business. Such a result would make the section meaningless, since, if it were correct, the workman might indeed be deemed to be within the sphere of his employment, but could never be acting for the purposes of or in connection with his employer's business in doing a prohibited act. In the present case all the facts proved show that the man was proceeding to Norwood Junction Station for the purposes of his work, and was just as much acting in connection with it as a workman proceeding from one portion of his employer's warehouse to another in order to execute some work at the spot to which he was making his way. Having regard to the facts proved, I do not think it was open to the learned county court judge to come to any conclusion other than that the deceased man was passing along the permanent way for his *employer's* purposes and in connection with *his* business.

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(1) [1937] A. C. 463.

Just, however, as it was said that, in order to succeed, the appellant must obtain a determination in her favour that the proviso had been fulfilled, so, it was contended, she required a finding by the county court judge that at the time of the accident Thomas Noble was acting in the course of his employment and that the accident arose out of it, a finding which she had not obtained. Here again I think the learned county court judge has misdirected himself in thinking that the prohibition placed the route taken by the deceased man outside the scope of his employment. To take such a view is, I think, to disregard s. 1, sub-s. 2, of the Act of 1925, and leaves your Lordships free to determine whether the act was within the man's employment or not. This view is in accordance with that reached in *Thomas* v. *Ocean Coal Co., Ld.* (1), and *Dennis* v. *A. J. White & Co.* (2), in both of which cases your Lordships' House felt itself free to draw its own conclusions from the facts found by the county court judge and reversed his finding that the workman was not entitled to recover. The observations of Lord Buckmaster in the former case (3), and those of Lord Parker in the latter (4), state, I think, the principles on which your Lordships should act.

I would allow the appeal and reverse the decisions of the county court judge and the Court of Appeal.

I am glad to feel that the majority of the Court of Appeal would have reached a similar conclusion if they had not felt themselves bound by *Clarke* v. *Southern Ry. Co.* (5), a case which must, I think, now be regarded as overruled.

Appeal allowed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*
Solicitor for respondents: *H. L. Smedley.*

(1) [1933] A. C. 100.
(2) [1917] A. C. 479.
(3) [1933] A. C. 108.
(4) [1917] A. C. 493.
(5) 20 B. W. C. C. 309.

[HOUSE OF LORDS.]

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1940
April 2, 3, 4, 22.

KNIGHTSBRIDGE ESTATES TRUST, LIMITED . . . . APPELLANTS;

AND

BYRNE AND OTHERS (TRUSTEES OF ROYAL LIVER FRIENDLY SOCIETY) RESPONDENTS.

Mortgage—Real estate—Demise for long term—Covenant for repayment by eighty half-yearly instalments—Rule against perpetuities—Clog on equity of redemption—Whether a mortgage of real property a " debenture "—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 74, 380.

The appellants in 1931 mortgaged their freehold properties to the respondents to secure a loan of 310,000*l*. By the deed the appellants covenanted to repay the money so borrowed with interest by eighty half-yearly instalments. By clause 2 of the deed the appellants demised the mortgaged land to the respondents for a long term of years with the usual proviso for cesser. A few years later the appellants, being desirous of redeeming the mortgaged property by the repayment of the principal sum borrowed, notwithstanding the stipulation contained in the deed as to the repayment by eighty half-yearly instalments, sought a declaration that they were so entitled to redeem at any time by giving the usual notice :—

Held, (1.) that the mortgage was a " debenture " within s. 74 of the Companies Act, 1929, having regard to the definition in s. 380, and therefore was not rendered invalid by reason of being redeemable only after forty years ; (2.) that the rule against perpetuities has no application to mortgages ; and (3.) that the appellants were not entitled to the declaration claimed.

Decision of Court of Appeal [1939] Ch. 441 affirmed.

APPEAL from a decision of the Court of Appeal (1), varying a decision of Luxmoore J. (2)

The question at issue was whether the appellants were entitled to redeem on the usual notice a mortgage dated November 6, 1931, and made between the appellants as borrowers, and the respondents as mortgagees, notwithstanding

(1) [1939] Ch. 441.

(2) [1938] Ch. 741.

**Present :* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

a provision in the mortgage for repayment by eighty half-yearly instalments of which the last would not fall due till November 6, 1971. It was claimed by the appellants, and denied by the respondents, that the attempt to postpone the right of redemption for a term of forty years constituted an illegal clog upon the equity of redemption. The appellants consequently claimed a declaration that, notwithstanding the provisions of the mortgage, they were entitled on the usual notice to redeem the mortgage upon payment of the principal money secured thereby with interest to the date of redemption and the proper costs of the respondents thereunder.

In addition to contesting the appellants' claim on general grounds, the respondents pleaded that the mortgage was a debenture within the meaning of s. 74 of the Companies Act, 1929, and was therefore exempt from the equitable rule against the clogging of an equity of redemption.

Luxmoore J. held that the provision in the mortgage deferring redemption for a period of forty years, taken in conjunction with various clauses in the deed which he regarded as unusual and oppressive, was unreasonable, and constituted an unlawful clog upon the right of the appellants, who were therefore entitled to redeem the mortgage on the usual notice. Luxmoore J. further held that the rule against perpetuities had no application to mortgages, and, further, that a common mortgage of freeholds was not a debenture within the meaning of s. 74 of the Companies Act, 1929.

The respondents appealed to the Court of Appeal, where it was held that as the mortgage represented a commercial agreement between two important corporations experienced in such matters, the provision for repayment by instalments and the other terms of the mortgage were open to no objection such as to justify the interference of the Court. The Court followed Luxmoore J. in holding that the rule against perpetuities has no application to mortgages, and expressed no opinion whether the mortgage was a debenture within s. 74 of the Companies Act, 1929.

The Knightsbridge Estates Trust, Ld., appealed to this House.

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H. B. Vaisey K.C. and *J. H. Stamp* for the appellants. The question is whether the appellants can claim now to redeem the mortgage which by its terms is not redeemable till the year 1971. Such a postponement of the right to redeem is, we submit, invalid, for a mortgage must always be redeemable within a reasonable time. Here the equity of redemption is unduly clogged. Moreover, the effect of holding the parties to their bargain has the consequence of sterilizing much property in the west end of London for nearly forty years—a serious burden wholly out of proportion to the necessities of the case. In *Teevan* v. *Smith* (1) Sir George Jessel M.R. said that " although the law will not allow a " mortgagor to be precluded from redeeming altogether, yet he " may be precluded from redeeming for a fixed period, such " as five or seven years "—language which shows that he would not have regarded forty years as reasonable. The same view was taken by Romer J. in *Biggs* v. *Hoddinott.* (2) In *Morgan* v. *Jeffreys* (3) it was held that a proviso against redemption for twenty-eight years exceeded all reasonable limits and could not be enforced; and in the later case of *Fairclough* v. *Swan Brewery Co., Ld.* (4), the Judicial Committee laid it down that equity will not permit any device or contrivance to prevent or impede redemption unduly: see also the observations of Lord Parker of Waddington in *Kreglinger* (*G. & C.*) v. *New Patagonia Meat, etc., Co.* (5). In *Davis* v. *Symons* (6) Eve J. held that the postponement of redemption for twenty years, together with certain other provisions which made the policies mortgaged in effect irredeemable, was a clog on the equity, and the mortgagor was held entitled to judgment in an action for redemption. As was said by Lord Macnaghten in *Noakes & Co., Ld.* v. *Rice* (7), " redemption is of the very " nature and essence of a mortgage, as mortgages are regarded " in equity. It is inherent in the thing itself. And it is, I " think, as firmly settled now as it ever was in former times " that equity will not permit any device or contrivance

(1) (1882) 20 Ch. D. 724, 729.
(2) [1898] 2 Ch. 307, 311.
(3) [1910] 1 Ch. 620.
(4) [1912] A. C. 565.
(5) [1914] A. C. 25, 49, 52, 53.
(6) [1934] Ch. 442.
(7) [1902] A. C. 24, 30.

"designed or calculated to prevent or impede redemption." In *Bradley* v. *Carritt* (1) Lord Macnaghten, referring to *Biggs* v. *Hoddinott* (2) said that "it purported to decide that a "mortgage may be made irredeemable for a reasonable period." Here the period is not reasonable. As is said in Halsbury's Laws of England, vol. xxv., p. 160: "If, again, it is provided "that the right [to redeem] shall not be exercised for a period "which the Court considers unreasonable, the restriction is "invalid, not on the ground of perpetuity, but as a clog on the "equity of redemption." With regard to the suggestion that the mortgage is a debenture and so not subject to the rules relating to mortgages, we submit that an ordinary mortgage of land, such as this is, is not a debenture. A mortgage cannot be made irredeemable. There is an essential difference between debentures and mortgages.

[LORD PORTER. Debentures are usually in a series.]

[VISCOUNT MAUGHAM. There may, however, be a single debenture.]

Sect. 73 of the Companies Act, 1929, presupposes a register of debentures. It deals with debentures in the limited sense of that term; and it does not include a mortgage on land which is dealt with by s. 89. In the group of sections of the Act "debenture" has the limited meaning usually attached to that word; it is entirely inappropriate to a freehold mortgage.

J. M. Gover K.C. and *Wilfrid M. Hunt* for the respondents.

[VISCOUNT MAUGHAM. We only desire to hear you on the question whether the document we are considering is a debenture or not.]

We submit that it is. If the appellants had issued six documents in the same form as the present one, there could be no difficulty in describing each as a debenture. Sect. 74 of the Companies Act, 1929, clearly applies to a freehold mortgage. It has been said that as it appears in a fasciculus of sections headed "Special Provisions as to Debentures," and is followed by another group headed "Registration of "Charges with Registrar of Companies," this document

(1) [1903] A. C. 253.

(2) [1898] 2 Ch. 307.

cannot be termed a debenture, but it has been overlooked that in the Act which originally introduced the provisions of s. 74—the Act of 1907—it was part of a fasciculus headed "Mortgages and Charges." In the present fasciculus beginning with s. 79, it is obvious that a series of debentures or a single debenture creating a charge are included.

H. B. Vaisey K.C. in reply. The whole of Part II. of the Act of 1929 is dealing with the capital of the company, either of shares or debentures, and is not dealing with an ordinary mortgage of land. Moreover, the document under consideration is not framed in the form of a debenture. Throughout the whole Act the word "debenture" has attached to it its ordinary meaning.

The House took time for consideration.

1940. April 22. Viscount Maugham. My Lords, this appeal raises the question whether the appellants, who are mortgagors, are entitled to redeem on the usual notice a mortgage dated November 6, 1931, made between the appellants of the one part and the respondents (who are trustees of the Royal Liver Friendly Society) of the other part, notwithstanding a provision in the mortgage for repayment of the loan of 310,000*l.* by eighty half-yearly instalments. It was not in dispute before your Lordships that on the true construction of the mortgage the appellants were not entitled to pay off the loan otherwise than by the instalments and at the times provided in the mortgage, so that the appellants would not be entitled to the free enjoyment of their property for forty years except by a voluntary concession from the respondents.

Three questions of law emerged on the argument before your Lordships which may be stated as follows:—

(1.) Whether the provisions in the mortgage which purported to postpone for so long a period the right of redemption were not void in equity as preventing redemption for an unreasonable length of time, having regard to certain circumstances which, it was alleged, made the provisions as to such postponement oppressive on the appellants and unnecessary for the protection of the respondents?

(2.) Whether any of the provisions of the mortgage were invalidated by the rule against perpetuities?

(3.) Whether the mortgage is a debenture within the meaning of s. 74 of the Companies Act, 1929, having regard to the definition contained in s. 380 of that Act?

The first two questions raised the points on which the appellants relied, the third was a contention on the part of the respondents, who claimed that s. 74 of the Act in effect removed any doubt as to the validity of the provisions postponing the right of redemption.

The action was heard by Luxmoore J. who held by his judgment dated April 13, 1938, that the provision in the said mortgage deferring redemption for a period of forty years, taken in conjunction with clauses in the deed which he regarded as unusual and oppressive, was unreasonable and constituted an unlawful clog upon the right of the appellants to redeem the mortgage and that the appellants were entitled to redeem the mortgage on the usual notice. The learned judge further held in favour of the respondents that the rule against perpetuities has no application to mortgages and in favour of the appellants that a common mortgage of freeholds is not a "debenture" within the meaning of s. 74 of the Companies Act, 1929.

The respondents' appeal to the Court of Appeal (Greene M.R., Scott L.J. and Farwell J.) was allowed. Judgment was delivered on behalf of the Court by the Master of the Rolls. It was thereby held that while the Court would not enforce any provision in a mortgage which was unconscionable or which operated to prevent the mortgagor from exercising his right of redemption after the specified date for redemption, or which rendered the right of redemption illusory, the Court is not further concerned with the question whether the terms of the mortgage are reasonable and a provision that the date for redemption shall be postponed for a given period however long is not on that ground alone unenforceable; and that in the present case, where the mortgage represented a commercial agreement between two important corporations, experienced in such matters, the provision for repayment by instalments and the other terms above mentioned were open to no objection which justified the interference of the Court. The Court also held that the rule against perpetuities has no application to mortgages, but expressed no opinion as to whether the mortgage is a debenture for the purpose of s. 74 of the Companies Act, 1929.

In the course of the able arguments for the appellants it became manifest that logically the first matter to be determined was the third question above stated, namely, the question whether s. 74 of the Companies Act, 1929, applied. That section is in the following terms: "A condition contained "in any debentures or in any deed for securing any debentures, "whether issued or executed before or after the commencement "of this Act shall not be invalid by reason only that the "debentures are thereby made irredeemable or redeemable "only on the happening of a contingency, however remote, "or on the expiration of a period, however long, any rule of "equity to the contrary notwithstanding."

Sect. 380 of the Act so far as relevant provides: "In this "Act, unless the context otherwise requires, the following "expressions have the meanings thereby assigned to them "(that is to say):—

. . . .

" 'Debenture' includes debenture stock, bonds and any "other securities of a company whether constituting a "charge on the assets of the company or not."

If then the mortgage was a debenture within s. 74 it was difficult to see how the appellants could succeed on the main point. Your Lordships, therefore, after fully hearing counsel for the appellants, thought it right to call on counsel for the respondents on the question arising under s. 74, and eventually did not think it necessary to call on the respondents for an argument on either of the other two points which I have stated. In these circumstances it would not be right for me to express any opinion on the first question, and I wish to reserve full liberty to consider that question if it should arise

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in a case where s. 74 did not apply. On the other hand I must make some observations on the second question, as to the application of the rule against perpetuities, a matter as regards which none of your Lordships felt any doubt that the decisions of Luxmoore J. and the Court of Appeal were right.

My Lords, the judgment of Luxmoore J. contains an elaborate statement of the history of s. 74 and of the reasons which led him to the conclusion that the section did not apply to the mortgage in the present case. Unfortunately his attention does not seem to have been called to the Companies Act, 1928, which was not a consolidating but an amending Act, and he accordingly thought that the extended definition of the word " debenture " was first found in the Companies Act, 1929, which, as he justly observed, was a consolidating statute. In fact the extension of the definition is to be found in the Second Schedule to the Act of 1928 where the added words are to be found as an amendment of s. 285 of the Companies Act, 1908. (See s. 99 of the Act of 1928.) The consolidating Act of 1929 reproduced as part of the consolidation the amended definition of the word debenture, and there is, therefore, no room for any such presumption excluding an amendment of the existing law by a consolidating statute as the learned judge relied on.

The position therefore is as follows : The substance of s. 74 of the Companies Act, 1929, was first found in the Companies Act, 1907, s. 14, where it was prefaced by the words " for "removing doubts it is hereby declared that," etc. There was no definition of the word " debenture," and there is strong ground for thinking that, whatever be the ambit of the word, it did not in that section include an ordinary mortgage of land. The consolidating Act of 1908 reproduced the provision of s. 14 of the Companies Act, 1907, omitting the introductory words. It was in the exact terms of the present s. 74 of the Companies Act, 1929. The definition clause (s. 285) stated that " ' debenture ' includes debenture stock," which perhaps made it even clearer that " debenture " did not include a mortgage of land in ordinary form. But the amending Act of 1928 contained the provision that at the end of the definition of " debenture " in s. 285 of the Companies Act, 1908, " there "shall be added the words ' bonds and any other securities of " ' a company whether constituting a charge on the assets of " ' the company or not.' "

It is perhaps worth pointing out that the words " unless "the context otherwise requires," which we find in the consolidating Act of 1929, are not to be found in the amending Act of 1928. I attribute little weight to this fact, for in my opinion some such words are to be implied in all statutes where the expressions which are interpreted by a definition clause are used in a number of sections with meanings sometimes of a wide and sometimes of an obviously limited character.

On the other hand I think due weight ought to be attributed to the words " otherwise requires " in the Companies Act of 1929, and it is incumbent on those who contend that the definition does not apply to s. 74 to show with reasonable clearness that the context does in fact require a more limited interpretation of the word " debenture " than s. 380 has assigned to it.

If we begin by asking what the word " debenture " means, apart from any definition, the reply must be that it has no precise meaning. Chitty J. observed in the case of *Levy* v. *Abercorris Slate and Slab Co.* (1), that the word " means a "document which either creates a debt or acknowledges it, "and any document which fulfills either of these conditions "is a debenture." An interesting extract from Skeat's Etymological Dictionary (1882) will be found in a footnote to the case (p. 264). Sir Nathaniel Lindley had previously stated simply, " What the correct meaning of ' debenture ' "is I do not know" : *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (2) In *Lemon* v. *Austin Friars Investment Trust, Ld.* (3), the same ignorance was professed in the Court of Appeal. Warrington L.J. in particular, after observing that it had been said " by a wiser "man than himself " that it was impossible to give an

(1) (1887) 37 Ch. D. 260, 264.
(2) (1881) 7 Q. B. D. 165, 172.
(3) [1926] 1 Ch. 1.

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exhaustive definition of the word "debenture," went on to remark that he did not propose to incur the reproach of venturing where wise men fear to tread. The text books are agreed at least in this that no accurate definition of the word can be found. I think it sufficient to cite Buckley on the point (11th ed., p. 174). It is clear, therefore, that it was desirable to insert in any consolidation of the Companies Acts a definition of the word.

We must next ask ourselves whether there was any reason for limiting s. 74 of the Act of 1929 to debentures of a series issued to a number of subscribers in one of the forms now in common use or in some such way. The reason for the section is explained in the note to the section in Buckley, 11th ed., pp. 154-5. Enormous sums had been borrowed by companies formed under the general Companies Acts on debentures and debenture stock the principal of which was (in terms) either not repayable at all or only in certain specified events. Doubts had been expressed whether these restrictions on the right of redemption were valid (*Jarrah Corporation* v. *Samuel* (1); *In re Southern Brazilian, etc., Timber, Wood Paving, etc., Co., Ld.* (2)), and it seemed desirable to remove these doubts by the Companies Act, 1907. The equitable rule was based on the hypothesis that in a contract for a loan the borrower is not usually contracting on equal terms with the lender. I find the reason quaintly stated in the case of *Floyer* v. *Lavington* (3), by Sir Joseph Jekyll as counsel in a case heard by Cowper L.C. He explained the ground for holding that a mortgage cannot be rendered irredeemable thus: "As the borrower is commonly necessitous, "this would put it in the power of the scrivener to make "advantage of such necessities, and would let in oppression, "and foreclose the power and jurisdiction of this Court." In saying that this was the real foundation of the interference of the Court of Equity with the legal right of the mortgagee I am not forgetting the technical account of the matter given by Lord Haldane L.C. and Lord Parker in *Kreglinger (G. & C.)* v. *New Patagonia Meat, etc., Co.* (4) Lord Haldane himself truly

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(1) [1903] 2 Ch. 1, 15.
(2) [1905] 2 Ch. 78.
(3) (1714) 1 P. Wms. 268.
(4) [1914] A. C. 25.

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observed (1) that "the lending of money, on mortgage or "otherwise, was looked on with suspicion, and the Court was "on the alert to discover want of conscience in the terms "imposed by lenders."

My Lords, loans made to limited companies on the security of their assets are in general very different from loans made to individuals. Companies may be wound up, in which event their debts have, if possible, to be paid, but they do not die. To the knowledge of both the company and the lender the loan is intended in most cases to be of the nature of a permanent investment. The former can only in the rarest of circumstances be at the mercy of the latter. There is no likelihood of oppression being exerted against the company. Considerations such as these make it manifest that clauses in debentures issued by companies making them irredeemable or redeemable only after long periods of time or on contingencies ought to be given validity. It may be conceded that the ground for excluding the rule in equity is stronger in the case of a series of debentures issued in one of the usual forms than in the case of mortgages of land to an individual; but some of the reasons still remain. It is difficult to see any real unfairness in a normal commercial agreement between a company and (for example) an insurance society for a loan to the former on the security of its real estate for a very prolonged term of years. Both parties may be equally desirous that the mortgage may have the quality of permanence. There is a great deal to be said in such a case for freedom of contract.

I do not think there is any strong argument for suggesting that s. 74 of the Act of 1929, or any of its predecessors, ought by reason of its nature to be confined to what may be called ordinary debentures. As we have seen, some definition was certainly desirable, and the very wide terms used by the Legislature in the Act of 1928 and reproduced in the consolidating Act of the following year seem to me to show that it was intended to give freedom of contract as regards the particular matter involved in s. 74 in relation to any securities

(1) [1914] A. C. 25, 36.

granted on loan by a company registered under the Companies Acts. It is contended that the context otherwise requires. I am unable to find any such context. It is, of course, true that some of the ss. 73 to 78 which are to be found under the heading "Special Provisions as to Debentures" are not dealing with mortgages of land by a company to an individual. Sect. 73, for example, is apparently dealing with debentures issued in a series and registered. Sect. 75 is perhaps also limited in the same way. It does not seem to me, as at present advised, that ss. 76 and 78 require any such qualification. We are dealing with an Act in which the word "debenture" is used in numerous sections, and it must be admitted in more than one sense. The practice of inserting a definition in such a case has often been criticized. It was described by Blackburn J. in *Lindsay* v. *Cundy* (1) as a modern innovation which frequently does a great deal of harm, and by Lord St. Leonards L.C. in *Ely* (*Dean and Chapter*) v. *Bliss* (2), as an attempt to put a general construction on words which in the different senses in which they are introduced in the various clauses of an Act do not admit of such. It is probably too late to add to these and other complaints. All we can do is to see whether the interpretation clause in this case can reasonably be applied to s. 74 without leading to any startling result and whether there is any context which requires us to reject some of the words of the definition. The fact that a particular section contains a provision relating to a particular kind of debenture does not assist us. We do not, for example, use the word "man" in a restricted sense if we make a statement about white men. "Man" has its ordinary meaning; it is the word "white" which qualifies the statement and makes it applicable to only some men. So here s. 74 itself applies only to debentures creating a charge. That is because the section applies only to debentures creating a charge capable of being redeemed. It is not a reason for holding a security of a company creating a mortgage of land is not a debenture within s. 74. Finally, it should be noted that the mortgage with which we are concerned on the present appeal could

(1) (1876) 1 Q. B. D. 348, 358.

(2) (1852) 2 De G. M. & G. 459.

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without difficulty have been drafted in the form of an ordinary company debenture with a charge on its face followed by the provisions as to the instalments by which it is to be paid off, and if desired with the various conditions and provisos printed on the back.

For these reasons I am of opinion that the word "debentures" in s. 74 must be given the meaning attached to that word by s. 380.

The contention that the rule against perpetuities applies to the mortgage has not been very strongly urged by counsel for the appellant who candidly admitted that he raised the point because the reason often given for exempting mortgages from the rule against perpetuities was that a condition in a mortgage precluding redemption for over twenty-one years would be void in equity. Both Luxmoore J. and the Court of Appeal pointed out that the rule has never been applied to mortgages, and they declined to depart from the established view that mortgages were not within the rule. In my opinion they were justified in taking that course. I will only add that since the Law of Property Act, 1925, came into force it seems to be more difficult than ever to invoke the rule in the case of mortgages. Where, as in the present case, there is a mortgage term for 3000 years with a statutory provision for cesser of the mortgage term on discharge of the money secured by the mortgage it would seem difficult to consider the case as being within the rule. In saying this I do not wish to throw any doubt upon the view that mortgages before the year 1926 were an exception to the rule.

My Lords, the question remains whether, accepting the view that s. 74 of the Companies Act, 1929, applies, the appellants can obtain a declaration that they are entitled on the usual notice to redeem the mortgage upon payment of principal, interest and costs. In my judgment the section establishes that the fact that the mortgage is made irredeemable for forty years is not itself a ground for the application of the rule of equity assuming that but for the section it would apply. I am not forgetting the words "by reason only that the "debenture," etc.; but the word "only" does not, I think,

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detract from the fact that the main ground for attack on the present mortgage is the length of time which must elapse before the right of redemption will exist according to its terms. Apart from the provision postponing the right of redemption there would be no objection to the mortgage. The word " only " in the section leaves open for consideration by the Court cases where there has been hardship or oppression by the mortgagee ; but I am unable to take the view in this case that the terms of the mortgage are so stringent and the restrictions which it imposes on dealings by the appellants with the mortgage properties are so oppressive that these matters read in the light of the provisions of s. 74 would justify the interference of the Court. In this connection it is right on the question of hardship to take into account the circumstances in which the mortgage was entered into, the great experience of the solicitors on both sides, and the care with which the negotiations were conducted. The appellants executed the mortgage with their eyes wide open. In such a case, the Court in these days must be slow to interfere with a contract deliberately entered into ; and having regard to the view above expressed as to s. 74 and its consequences I must come to the conclusion that the appellants' claim to redeem contrary to the terms of the mortgage must fail.

For these reasons I am of opinion that the appeal should be dismissed with costs.

LORD ATKIN. My Lords, I have had an opportunity of reading in advance the opinion which has just been delivered by my noble and learned friend Viscount Maugham, and also the opinion which is about to be delivered by my noble and learned friend Lord Romer. I agree with them and I have nothing to add.

LORD WRIGHT. My Lords, I also have had a similar advantage. I agree with the opinion of the noble and learned Lord on the Woolsack, and with that about to be delivered by my noble and learned friend Lord Romer.

LORD ROMER. My Lords, at the conclusion of the interesting arguments of Mr. Vaisey and Mr. Stamp on behalf of the appellants, it became clear that it is desirable to ascertain in the first place whether the mortgage of November 6, 1931, is a debenture within the meaning of s. 74 of the Companies Act, 1929, and, if that question be answered in the affirmative —whether the claim of the appellants to be entitled to redeem the mortgage at the present time must not necessarily fail in view of the provisions of that section. Your Lordships accordingly requested Mr. Gover, on behalf of the respondents, to confine his argument to those particular questions. I understand that on due consideration of the arguments on the one side and the other all your Lordships have come to the conclusion that both the questions should be answered adversely to the appellants. In that conclusion I concur, and will now state quite shortly my reasons for so doing.

The section in question is in these terms: " A condition "contained in any debentures or in any deed for securing "any debentures, whether issued or executed before or after "the commencement of this Act, shall not be invalid by "reason only that the debentures are thereby made irredeem-"able or redeemable only on the happening of a contingency, "however remote, or on the expiration of a period, however "long, any rule of equity to the contrary notwithstanding."

The history of this section is set forth by Luxmoore J. (as he then was) in his judgment in the present case. Shortly stated the history is as follows. It first appeared in substantially the same form as now in s. 14 of the Companies Act of 1907, and it was repeated in s. 103 of the Companies Act of 1908. Luxmoore J. has examined those Acts and has given reasons that to my mind are conclusive for thinking that an ordinary mortgage of freehold property was not a debenture or a deed for securing debentures within the meaning of those sections. " No one "—I am quoting from Buckley on the Companies Acts, 11th ed., p. 174—" seems to know exactly "what 'debenture' means." As " no one " in this passage presumably included Lord Wrenbury himself, I am not ashamed to say that it certainly includes me. But this much

I can say without hesitation, that the word "debenture" as ordinarily employed in legal and commercial circles did not in the year 1908 include an ordinary mortgage of land. When, therefore, s. 103 of the Companies Act, 1908, was reproduced word for word in s. 74 of the Act of 1929, the conclusion to which one would have come at first sight would have been that it was not the intention of the Legislature to bring such a mortgage within the operation of the last mentioned section. And this conclusion would have been strengthened by a consideration of the other provisions of the 1929 Act until one arrived at the definition of the word "debenture" contained in s. 380. It is, for instance, to be observed that s. 74 is contained in Part II. of the Act, the heading of which is "Share Capital and Debentures" and which contains (s. 34) provisions relating to prospectuses inviting persons to subscribe for shares in, or debentures of, a company; provisions (s. 63) as to the transfer of shares in or debentures of the company by a proper instrument of transfer, and (s. 67) as to the issue of certificates of shares, debentures, and debenture stock allotted or transferred, provisions that scarcely seem applicable to ordinary mortgages of land. Then, again, s. 74 itself forms one of a fasciculus of sections under the heading "Special Provisions as to Debentures," the first of which sections confers upon the registered holder of any debentures and any shareholder of the company, but apparently upon no one else, a right of inspecting the register of holders of debentures. This may usefully be contrasted with the provisions in s. 82, sub-s. 3, which give a right of inspection of the register of charges to any member of the public who cares to pay the prescribed fee for the privilege. It might too have reasonably been expected that if s. 74 was intended to apply to an ordinary mortgage of land it would have appeared in Part III. of the Act which is dealing with the registration of charges—a word that includes mortgages (s. 79, sub-s. 10 (*a*)) —rather than in Part II. of which so many of the provisions are inapplicable to an ordinary mortgage of land.

But s. 380 of the Act provides that unless the context otherwise requires the expression "debenture" in the Act includes "debenture stock, bonds and any other securities of "a company whether constituting a charge on the assets of "the company or not." Now the considerations to which I have referred certainly arouse a suspicion in my mind that when enacting s. 74 of the Act, the Legislature had not ordinary mortgages of land in its contemplation. But I find it quite impossible to say that those considerations require that such mortgages should be excluded from the operation of the section. When applied to such mortgages the provisions of the section are quite sensible. They involve no absurdity and no inconsistency. On the contrary. If it be thought desirable that debentures in their popular meaning may be made irredeemable, it would seem to be both absurd and inconsistent to forbid a company to make its ordinary mortgages of land also irredeemable. I can find no legitimate reason for not attributing to the word "debentures" in s. 74 the meaning given to it by s. 380.

The reason that induced Luxmoore J. to come to the opposite conclusion was this. Regarding the Act of 1929 as being, as indeed it is, a consolidating statute, he rightly said that it must be construed ordinarily so as to exclude any amendment of the previously existing law. But his attention was not drawn to the Companies Act, 1928. That was an amending Act passed with a view to the consolidation of the law which was effected by the Act of 1929, and one of the amendments made by the Act of 1928 was an amendment of the definition of the word "debenture" contained in s. 285 of the Act of 1908. As a matter of fact the Legislature had not in that section attempted to do what no one had succeeded in doing before, namely, give an exhaustive definition of the word "debenture." It contented itself with saying that "debenture" includes debenture stock. Then came the Act of 1928 in which a number of minor amendments to sections of the 1908 Act were set out in the Second Schedule. Among them was this: "Section 285. At the end of the "definition (*sic*) of debenture there shall be added the words "'bonds and any other securities of a company whether "'constituting a charge on the assets of the company or not'."

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Hence the definition of "debentures" in s. 380 of the consolidating statute of 1929.

It was, however, contended on behalf of the appellants that the words "any other securities" should be construed as referring only to securities ejusdem generis as the genus to which debentures belong. All I can say about this is that, if no one seems to know exactly what "debenture" means, no one can be expected to know what is ejusdem generis with it. Indeed, the very fact that no one seems to know exactly what debenture means indicates pretty plainly that debenture is itself the name of a genus and not of a species. In my opinion the words "any other securities" mean what they say, and include all other securities of any kind whatsoever.

It was finally urged on behalf of the appellants that they are not attacking the provisions of the mortgage of November 6, 1931, by reason only that it is irredeemable until the expiration of a period too remote, but by reason of the other conditions contained in the mortgage when read in combination with the postponement of the right of redemption. It is, however, quite plain that what the appellants are complaining of is the denial of their right to redeem at the present time, and that the materiality of the other conditions to which they called your Lordships' attention is merely this: that the existence of them renders it essential for the appellants, if they can possibly do so, to redeem forthwith. If it were not for the conditions in the mortgage making it irredeemable until the expiration of forty years from its date, the appellants would have no cause of complaint.

For these reasons I am of opinion that this appeal should be dismissed with costs.

LORD PORTER. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Clifford-Turner & Co.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Bremner, Sons & Corlett, Liverpool.*

[HOUSE OF LORDS.]

COHEN . . . . APPELLANT ;

AND

COHEN . . . . RESPONDENT.

H. L. (E.)*

1940

Feb. 29;
April 15.

Divorce—Desertion—Effect of previous petition on the file—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

The fact that a petition for divorce on the ground of desertion has been left on the file does not preclude the competency of a second petition for desertion and the granting of a decree.

Stevenson v. *Stevenson* [1911] P. 191 overruled.

APPEAL from an order of the Court of Appeal affirming an order of Hodson J., dismissing the appellant's petition for the dissolution of her marriage.

The appellant and the respondent were married on March 21, 1921. In December, 1925, the respondent deserted the appellant, and had not, since that date, returned to live with her.

On March 11, 1929, an order was made against the respondent, on the application of the present appellant, in the Reading Police Court under the Summary Jurisdiction, (Separation and Maintenance) Acts, 1895 to 1925, on the ground that the respondent had wilfully neglected to provide reasonable maintenance for the appellant and her child, requiring the respondent to pay to the appellant maintenance at the rate of 10*s.* a week for herself and 10*s.* a week for the child of the marriage, custody of whom was given to the appellant.

On December 8, 1930, an order was made directing payment of those sums to the appellant instead of through the officer of the Court; and in 1932, upon a summons for arrears, the respondent was ordered to pay to the appellant 20*l.*, and on January 4, 1933, an order was made reducing the payment to 12*s.* 6*d.* a week.

* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

On March 31, 1930, the appellant presented a petition for the dissolution of her marriage on the ground of the respondent's adultery, which petition, however, was not proceeded with by reason of difficulty in serving the woman named in the petition, the lack of available evidence, and the expense entailed. Apart from service of the petition on the respondent and an answer by the latter denying the adultery, no further step was taken until the petition was dismissed on the appellant's application.

In October, 1936, the appellant received from the respondent a letter enclosing an hotel bill relating to the visit of " Mr. "and Mrs. Cohen " on July 25, 1936, to an hotel in London, and on May 25, 1937, the appellant presented a fresh petition for divorce on the ground of her husband's adultery at the hotel referred to, but that petition was not proceeded with owing to the doubt entertained as to proof of the adultery alleged.

On January 1, 1938, the Matrimonial Causes Act, 1937, came into force, and by s. 2 (*b*) desertion for three years immediately preceding the presentation of the petition was made a ground for divorce by either spouse, and thereafter, on February 2, 1938, an application was made on behalf of the appellant for leave to file a supplemental petition for the dissolution of the marriage on the ground of the respondent's desertion for a period of at least three years, but that application was refused by reason of a Divorce Practice Note dated December 16, 1937, directing that where relief under the last mentioned Act was sought, such relief must not be sought by a supplemental petition to a petition dated prior to January 1, 1938, the date when the Matrimonial Causes Act, 1937, came into operation, but that a fresh petition must be filed. Thereupon the petition dated May 25, 1937, was dismissed on the appellant's application.

On March 2, 1938, the appellant presented a fresh petition for the dissolution of her marriage on the ground of the respondent's desertion for at least three years immediately preceding. That petition was served on the respondent, but no appearance was entered.

On January 18, 1939, that petition came before Hodson J., who held that in 1925 the respondent had deserted the appellant, and had deserted her ever since, but in view of the fact that the previous petitions praying for the dissolution of the marriage were on the file, he was bound by the decision in *Stevenson* v. *Stevenson* (1), to hold that that circumstance prevented the subsequent desertion by the respondent being without excuse. Hodson J.'s decision being upheld in the Court of Appeal, the appellant appealed to this House.

H. B. Durley Grazebrook K.C. and *J. E. Neville Russell* for the appellant. The decision in *Stevenson* v. *Stevenson* (1) by which Hodson J. and the Court of Appeal felt bound was wrong in its reasoning and should not be followed. In every case desertion is a question of intention to be gathered from the declarations and conduct of the deserting spouse; and once desertion is established there is a presumption that it continues until some step is taken by that spouse to resume cohabitation. As was said by Buckley L.J. in *Harriman* v. *Harriman* (2) the question whether there was a continuing desertion is a question of fact. Here it is not the wife who is keeping the husband away; it is the woman with whom he is living in adultery.

[LORD ROMER. The desertion of the erring spouse continues till he or she does something to terminate it. If the wife shows that she will not agree to have the deserting husband back, that is one thing; but I cannot see why the mere presentation of a petition for divorce should prevent her getting the relief she seeks because of her husband's adultery.]

As was pointed out by Scrutton L.J. in *Bowron* v. *Bowron* (3) "In some cases it is clear that the facts would show such a "continuing intention, as where the husband continues living "with a woman in the house, whose presence caused the wife "to leave." As was pointed out in *Sifton* v. *Sifton* (4), where a spouse is deserted the presumption is against the deserting spouse. In *Lynch* v. *Lynch* (1) the fact of the existence on the file of the Court of a nullity petition of which the husband was ignorant and which did not affect his conduct, did not preclude the wife obtaining a decree for the dissolution of the marriage on the ground of desertion.

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(1) [1911] P. 191.
(2) [1909] P. 123, 148, 149.
(3) [1925] P. 187, 195.
(4) [1939] P. 221.

Sir Terence O'Connor S.-G. and *S. E. Karminski* on behalf of the Attorney-General, at the invitation of the House. The first question is, has the separation of the spouses been occasioned by the adverse act of the husband ? Where that is found, as it is, the next question is whether there was the animus deserendi on the part of the husband, and he had no good cause for continuing the separation ? The animus deserendi may be destroyed by something done by the petitioner, such as, for example, making unfounded charges against the respondent and thus giving him just cause for staying away. That would, of course, have to be the effective cause for him remaining away, the burden being upon him. As was said in *Knapp* v. *Knapp* (2), "there never was a time at "which the petitioner was bound to go back and live with "him, because she was always justified in refusing to do so "as long as he continued to live with the woman for whose "company he had abandoned her" : see also *Farmer* v. *Farmer*. (3) In *Wood* v. *Wood* (4) a petition was on the file for part of the time necessary to make up the two years, but nevertheless a decree was granted ; see also *Failes* v. *Failes* (5) where the deserted wife was not precluded from obtaining a decree by the fact that after the husband's desertion she applied for and obtained a separation order. In *Pardy* v. *Pardy* (6) it was pointed out that in such cases the whole of the conduct and words of the parties are to be taken into account. That has been done in the present case. It is submitted that *Stevenson* v. *Stevenson* (7) was wrongly decided.

The respondent did not appear and was not represented.

The House took time for consideration.

(1) [1939] P. 355.
(2) (1880) 6 P. D. 10.
(3) (1884) 9 P. D. 245.
(4) (1887) 13 P. D. 22.
(5) [1906] P. 326.
(6) [1939] P. 288.
(7) [1911] P. 191.

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1940. April 15. VISCOUNT CALDECOTE L.C. (read by LORD MAUGHAM). My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Romer, which entirely expresses my views in the matter, and I have nothing to add.

VISCOUNT MAUGHAM. My Lords, on my own behalf I wish to say that I, too, have had the advantage of reading the opinion which I have just mentioned, and as I entirely agree with it I, too, have nothing to add.

My Lords, I am requested to say that Lord Russell of Killowen also had had the advantage of reading the opinion prepared by my noble and learned friend Lord Romer, and that he entirely agrees with it.

LORD WRIGHT. My Lords, I also have had the same advantage, and, like the noble and learned Lords whose opinions have already been expressed, I am fully in accord with the speech which is about to be delivered by my noble and learned friend Lord Romer. I have nothing to add.

LORD ROMER. My Lords, the appeal in this case raises a question of divorce law that is of considerable importance—of all the greater importance, perhaps, now that desertion is of itself a ground for divorce. The question is this: Where one of the spouses has committed the matrimonial offence of desertion, does that desertion necessarily come to an end by the presentation and service upon the deserting spouse of a petition by the other one asking for a dissolution of the marriage?

The facts giving rise to that question in the present case are the following. The appellant Dorothy Gertrude Cohen was married to the respondent Max Jaques Cohen on March 21, 1921, and a son, the only child of the marriage, was born in the month of April, 1923. About two years after the birth of the child the respondent deserted the appellant without cause, and since then has never himself taken any step, or indicated any intention or desire, to bring that desertion to an end. On March 11, 1929, upon the application of the appellant an order was made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground that the respondent had wilfully neglected to provide reasonable maintenance for the appellant and her child, that the respondent should pay a total sum of 1*l.* a week for such maintenance, the custody of the child being given to the appellant. The order, however, contained no provision under s. 5 (*a*) of the Act as to cohabitation. The sum of 1*l.* a week was upon the respondent's application reduced to 12*s.* 6*d.* a week by order dated January 4, 1933. The respondent frequently made default in payment of these weekly sums, and soon after the date of the last-mentioned order, he seems to have disappeared for a time, and ceased to make any payments towards the support of the appellant and her child. In the meantime, namely, on March 31, 1930, the appellant presented a petition in the High Court for the dissolution of the marriage on the ground of the respondent's adultery. The petition was duly served upon the respondent who put in an answer denying the adultery; but owing, as she says, to her want of means and the difficulty of serving the woman named in the petition, it was not further proceeded with, and, on May 4, 1937, it was dismissed upon the application of the appellant in the following circumstances. On October 15, 1936, the appellant received from the respondent a letter dated October 2, 1936, which so far as material was in these terms:

"Dear Dorothy,

"As it is now so many years that we have lived together "and now things have happened which for both our sakes "has made same impossible, I hope you will agree that we "both need our freedom to enable us to do the right thing for "the future.

"So am enclosing the evidence you have been wanting for "same.

"Yours,
"Max C."

Enclosed in the letter was a receipted hotel bill which indicated that the respondent and a woman referred to in the bill as " Mrs. Cohen " had passed the night together at the hotel on July 25, 1936.

In consequence of the receipt of this letter and enclosure the appellant obtained an order on May 4, 1937, dismissing the petition then on the file, and on May 25, 1937, presented a fresh petition for dissolution of her marriage on the ground of the respondent's adultery as evidenced by the hotel bill. The respondent was duly served with this petition, but in the light of subsequent information tending to show that no adultery had in fact been committed by him at the hotel, the appellant did not for the time being proceed further with it. On January 1, 1938, there came into force the Matrimonial Causes Act, 1937, which by s. 2 (*b*) made desertion without cause for a period of at least three years immediately preceding the presentation of the petition a ground for divorce. The appellant accordingly on February 2, 1938, applied to the Court for leave to file a supplemental petition on the ground of the respondent's desertion. This application was refused as being inconsistent with a practice note which directed that, in order to obtain relief under the new Act in such circumstances, a fresh petition must be filed. The petition dated May 25, 1937, was accordingly dismissed by an order dated March 1, 1938, made upon the appellant's application, and on March 2, 1938, she presented a fresh petition for the dissolution of her marriage based solely on the ground of the respondent's desertion without cause for a period of at least three years immediately preceding its presentation.

This petition was duly served upon the respondent ; but no appearance was entered on his behalf, and in due course it came on for hearing before Hodson J. as an undefended cause. The learned judge was satisfied upon the evidence that the respondent had deserted the appellant without cause in the year 1925 and, but for the fact of the presentation and service of the two earlier petitions, would have been prepared to hold that such desertion had continued without interruption up to March 2, 1938. There was, however, the fact that between March 31, 1930, and May 4, 1937, and between May 25, 1937, and March 1, 1938, there were petitions on the file, both of which had been served upon the respondent, in which the appellant was asking for the dissolution of the marriage. In these circumstances he felt, though with regret, that he was unable to hold that desertion without cause had subsisted for the three years immediately preceding March 2, 1938, the date of the presentation of the petition then before him. He was, he said, precluded, as indeed he was, from doing so by the decision of the Court of Appeal in *Stevenson* v. *Stevenson*. (1) The petition was therefore dismissed by order dated January 18, 1939.

The appellant then took the matter to the Court of Appeal where it was heard on May 2, 1939, before MacKinnon and Luxmoore L.JJ. and Macnaghten J. The Court held that it was impossible to distinguish the case from *Stevenson* v. *Stevenson* (1), and the appeal was dismissed, leave being given to appeal to your Lordships' House.

My Lords, from this narrative of the facts it is abundantly clear that the respondent in the year 1925 committed the matrimonial offence of desertion, and that from that date down to the filing of the present petition he has shown no indication by word or deed of any intention or desire on his part to bring that desertion to an end.

Now in the case of *Bowron* v. *Bowron* (2), where the intention of a husband to desert his wife had been established, it was said by Scrutton L.J. that the intention is presumed to continue unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back. There were certainly no such attempts in the present case. But as was said by Lord Macmillan in *Pratt* v. *Pratt* (3), a case in which a wife had deserted her husband: " In fulfilling "its duty of determining whether on the evidence a case of "desertion without cause has been proved, the Court ought "not, in my opinion, to leave out of account the attitude of "mind of the petitioner. If on the facts it appears that a "petitioning husband has made it plain to his deserting wife

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(1) [1911] P. 191.
(2) [1925] P. 187.
(3) [1939] A. C. 417, 420.

"that he will not receive her back, or if he has repelled all "the advances which she may have made towards a resumption "of married life, he cannot complain that she has persisted "without cause in her desertion." In the instances given by Lord Macmillan in this passage it would have been unreasonable to expect the deserting spouse to make any attempts, or any further attempts as the case might be, to put an end to the desertion. Other instances as will presently appear can be given of circumstances in which it would be unreasonable to expect the deserting spouse to make attempts to end the desertion. The deserting spouse is only bound in the language of Scrutton L.J. to make *reasonable* attempts. Had then the appellant in the present case done anything on her part to excuse the respondent from making any attempt to put an end to his desertion?

Before answering this question it is necessary to consider in some detail the decision of the Court of Appeal in *Stevenson* v. *Stevenson*. (1) In that case (decided under the Act of 1857) a wife had in July, 1910, presented a petition for judicial separation on the ground of her husband's adultery. In January, 1911, she presented a supplemental petition alleging desertion by her husband in December, 1908, and praying for a dissolution of the marriage. The adultery was proved, and also the desertion. But at the date of the original petition two years had not elapsed since the original desertion although it had done so at the date of the supplemental petition. Bargrave Deane J. however refused to make a decree nisi for dissolving the marriage on the ground that the filing of the petition for a judicial separation had put an end to the desertion. The Court of Appeal consisting of Sir Herbert Cozens-Hardy M.R. and Farwell and Kennedy L.JJ. held that he was right in so refusing. The Master of the Rolls, after alluding to the fact that at the date of the petition the desertion had lasted only eighteen months, said this: "The "presentation of the petition and its continuance on the "files of the Court prevented the subsequent desertion from "being without excuse. She was praying the Court to require

(1) [1911] P. 191.

"her husband to keep away. When the supplemental petition "was filed there had not been desertion for two years without "excuse. Bargrave Deane J.'s judgment seems to me to "be in strict accordance with the very careful judgment "of Gorell Barnes J. in *Kay* v. *Kay* (1), and with the judgment "of the full Court of Appeal in *Harriman* v. *Harriman.* (2) "Butt J.'s decision in *Lapington* v. *Lapington* (3) is also a "direct authority against the petitioner." The two Lords Justices merely agreed without giving any reasons of their own.

It will be observed that the Master of the Rolls did not base his decision upon any facts peculiar to the case before him. He laid down a general principle applicable to all cases where the deserted spouse places upon the file a petition for judicial separation or divorce. The subsequent desertion cannot, he held, be treated as being without cause while the petition remains on the file. I shall consider the reason that he gave for coming to this conclusion at a later stage in this judgment. For the moment I merely propose to call attention to the singular fact that, of the three cases to which he referred as justifying his conclusion, the first two in no way establish, and the third seems to be inconsistent with there being, any such general principle as he was laying down.

The facts in *Kay* v. *Kay* (1), so far as material for the present purpose, were as follows. In May, 1902, a wife filed her petition for divorce on the ground of her husband's adultery and cruelty. In December, 1903, she filed a supplemental petition alleging desertion without reasonable excuse for two years and upwards. At the trial of the cause before Gorell Barnes J. the charges of cruelty and adultery were negatived by the jury. It was then contended on her behalf that she was entitled to a decree of judicial separation by reason of the husband's desertion, which she alleged took place in the month of July, 1900, that is to say, less than two years before the original petition, but more than two years before the supplemental petition. In point of fact the desertion in July,

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(1) [1904] P. 382.
(2) [1909] P. 123.
(3) (1888) 14 P. D. 21.

1900, was not proved; but the learned judge went on to consider what would have been the result if it had been. He said this (1): "It seems to me that if nothing has happened "during the two years to entitle the wife to refuse to return "to the husband, if he desires to put an end to the desertion, "the petitioner, by filing a petition for divorce in the interval, "and making and maintaining throughout charges which are "in fact unfounded, and by that I mean charges which it is "shown give her on the real facts of the case no right to say "to him 'I will not have you back if you offer to return'; "and then, as an incident in those proceedings, obtains an "order for alimony and enforces it—that, I think, puts it out "of the power of the respondent to do anything, and it seems "to me it is a position in which, by her own act, the petitioner "is showing that she is no longer—no matter what his attitude "is—ready to receive him back, and can, I think, no longer "be held entitled to treat him as continuing to desert her."

This is very far from laying down any such general principle as was enunciated by the Master of the Rolls in *Stevenson* v. *Stevenson*. (2) In deciding the question whether or not the petition by the deserted wife in that case put an end to the desertion Gorell Barnes J. took into consideration (1.) the conduct of the deserting husband, (2.) the fact that the wife in the petition made unfounded charges against her husband —charges which the learned judge stigmatized as having "no reasonable basis," "no reasonable prospect of success," and as charges "unfounded in their character" which had been "flung" against him—and (3.) the fact that she actively maintained the petition by obtaining and enforcing orders for alimony. After the filing of the petition in that case the husband could not reasonably have been expected to take steps to end the desertion. Nor had the husband's conduct been such as to entitle the wife to refuse to return to him had he desired to put an end to the desertion, and the conduct of the husband is always a material consideration in such cases. If, for example, he is living in adultery with another woman as his wife, it would be absurd to think that it is the

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(1) [1904] P. 382, 395.

(2) [1911] P. 191.

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petition of the wife that is responsible for the continuance of his desertion.

Harriman v. *Harriman* (1) was a decision of the full Court of Appeal given in these circumstances. A husband deserted his wife in July, 1905. In March, 1906, the wife obtained an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, that her husband should pay a weekly sum for her support; but the order contained a provision under s. 5 (*a*) that the wife should no longer be bound to cohabit with her husband, and this provision by virtue of the sub-section had the effect of a decree of judicial separation. In December, 1907, the wife presented a petition for dissolution of the marriage on the grounds of the husband's adultery and of his desertion for two years without reasonable excuse. It was held that the effect of the non-cohabitation clause was to prevent the continuance of the desertion after the date of the order. There had been a decree or what was equivalent to a decree of the Court in the face of which it was out of the question that the husband should make any attempt to return to the matrimonial domicil. The case is no authority whatsoever for the proposition that the mere filing and service of a petition for divorce or judicial separation has of itself the same effect.

In *Lapington* v. *Lapington* (2) a husband deserted his wife in June, 1886. In August, 1886, the wife presented a petition for a dissolution of her marriage on the ground of the husband's adultery and cruelty. In July, 1888, she obtained leave to amend her petition by alleging in addition a charge of his desertion without reasonable cause for two years and upwards. At the hearing the petitioner abandoned the charge of cruelty and relied only upon the adultery and desertion. Butt J. refused to make a decree, but solely upon the ground that at the date of the petition the desertion had not continued for the necessary two years, and that the difficulty was not got over by amending the petition. "The cause of action," he said, "did not exist when the suit was commenced. At "common law, if a man issues a writ before the credit has

(1) [1909] P. 123.

(2) 14 P. D. 21.

"expired, he cannot obtain judgment on that writ by a simple "amendment. . . . .I am ready to grant you now a judicial "separation on the ground of adultery which will not prevent "further action on your part to turn it into a decree nisi for "dissolution on the ground of desertion, but it must be by a "fresh suit." How this can be regarded as an authority for saying that the desertion was put an end to by the filing of the petition and would cease to exist while the petition remained on the file passes my comprehension. It is true that Butt J. did not say in terms that the desertion had not been put an end to by the filing of the petition ; but it is clear that he must have thought that it had not, for the decree of judicial separation which he was ready to grant would necessarily bring the desertion to an end in accordance with the decision in *Harriman* v. *Harriman.* (1) The strong impression left on my mind by this case is that what I may call the *Stevenson* (2) principle was unknown to Butt J. It would also appear to to have been unknown to so great an authority upon the subject as Sir James Hannen. In *Wood* v. *Wood* (3) the relevant facts were (1.) petition by a wife in February, 1886, praying for dissolution of the marriage on the ground of adultery and desertion since January, 1884 ; (2.) hearing of the petition in June, 1886, when it was adjourned, desertion for two years not having been shown but only a desertion beginning in October, 1884 ; (3.) supplemental petition filed in August, 1887, alleging desertion since October, 1884 ; (4.) decree nisi for dissolution pronounced by Sir James Hannen in December, 1887. It will be observed that, although during the whole period from February, 1886, to December, 1887, the wife's petition was on the file, Sir James Hannen treated the desertion as continuing. In *Kettlewell* v. *Kettlewell* (4), a wife petitioned for dissolution of her marriage on the ground of her husband's adultery and cruelty. He had also deserted her but the two years had not elapsed at the date of the petition. At the hearing of the petition the charge of cruelty was not proved, but, two years having at that time elapsed

(1) [1909] P. 123.
(2) [1911] P. 191.
(3) (1887) 13 P. D. 22.
(4) (1880) 41 L. T. 737.

since the original desertion, Sir James Hannen gave the wife leave to amend her petition by alleging desertion for two years. Whether or not a decree for dissolution was then made does not appear from the report, though presumably one was in fact pronounced. But in any case Sir James Hannen would not have given leave to make such an amendment if the presentation and service of the petition had brought the desertion to an end.

My Lords, it is unnecessary to trouble your Lordships with decisions pronounced since the case of *Stevenson* v. *Stevenson* (1) was decided, because that case was undoubtedly binding upon all tribunals other than this House. I must, however, make an exception in the case of the recent decision of Langton J. in *Marthews* v. *Marthews* (2); for that learned judge expressed the view in that case that the principle laid down in *Stevenson* v. *Stevenson* (1) had received legislative recognition in s. 6, sub-s. 3, of the Matrimonial Causes Act, 1937. With all respect to Langton J. I am unable to take this view. The sub-section is in these terms: "For the "purposes of any such petition for divorce, a period of desertion "immediately preceding the institution of proceedings for "a decree of judicial separation or an order under the said "Acts having the effect of such a decree shall, if the parties "have not resumed cohabitation and the decree or order "has been continuously in force since the granting thereof, "be deemed immediately to precede the presentation of the "petition for divorce." The sub-section is dealing with a case where a decree of judicial separation or an order having the same effect has actually been made, and not to a case where a petition has been filed without any order having been made upon it. The sub-section would therefore appear to have been directed to avoiding the difficulty occasioned by the decision in *Harriman* v. *Harriman* (3) which was unquestionably rightly decided. I can draw no inference in favour of *Stevenson* v. *Stevenson* (1) from the fact that the sub-section does not deal with the difficulty that has been created by that case.

(1) [1911] P. 191.
(2) [1939] P. 97.
(3) [1909] P. 123.

Nor have I been able to find any support for that decision in any of the earlier authorities. I did not, indeed, expect to do so. For, with all respect to the eminent judges who were parties to the decision, I cannot agree that when a wife presents a petition for divorce or judicial separation she is "praying the Court to require her husband to keep away,"—if that be meant, as Sir Herbert Cozens-Hardy intended it to be meant, to refer to the period between the filing and the hearing of the petition: and yet that was the ground upon which the decision was based. There may be cases (*Kay* v. *Kay* (1) was one of them) where the petition contains gross charges against the husband so reckless and so unfounded that he cannot reasonably be expected to make any attempt to bring his desertion to an end. But, in a case such as the present, I can see no reason at all why the husband should be treated as being absolved from his duty to make any such attempt by the presentation and service of the petition. He must not, of course, try to "force himself into the matrimonial "home," to use the words of Sir Boyd Merriman in *Bush* v. *Bush*. (2) Any such molestation would be very properly punished by the Court. But the Court would never discourage a friendly attempt at reconciliation on the husband's part as, for example, by letter. It would, on the contrary, be only too ready to encourage any such attempt. The Divorce Court does not exist for the purpose of promoting the dissolution of marriages, but for the purpose of discharging the painful duty of dissolving them when all reasonable hope of reconciliation between the parties has come to an end.

My Lords, in my opinion, the decision in *Stevenson* v. *Stevenson* (3) in laying down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce or judicial separation was wrong and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all.

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(1) [1904] P. 382.
(2) [1939] P. 142, 144.
(3) [1911] P. 191.

It only remains to consider whether in the case now before your Lordships the respondent can be said to have had any reasonable excuse for making no attempt to put an end to his desertion of the appellant. For this purpose it is only necessary to consider the filing and service upon him of the two earlier petitions. No one has suggested, or could suggest on the facts that I have stated, that he could have had any other excuse. Now it is true that the first petition which was filed on March 31, 1930, charged the respondent with adultery. It was never proceeded with and the charge has never been proved. But it was never disproved, and there is nothing in the history of this case that even remotely suggests that the petition while it was on the file deterred the respondent in the very least from taking steps to end his desertion. Beyond serving the respondent nothing was done by the appellant under the petition and it remained neglected on the file until it was dismissed on May 4, 1937. In the meantime the appellant had been making more or less fruitless attempts to make the respondent pay the 20*s*. a week for the maintenance of herself and her child that had been ordered by the court of summary jurisdiction and the respondent had successfully applied to that court for an order reducing the allowance to 12*s*. 6*d*. a week. He paid this sum for a short time but then disappeared and made no further payments. His next appearance on the scene was when he wrote to his wife the letter of October 2, 1936, enclosing the hotel bill as evidence, though apparently untrue evidence, of his adultery. Thereupon, having got the first petition dismissed, she filed and served the second. No further proceedings were taken under it, and on March 1, 1938, it was dismissed, for the reasons I have mentioned in an earlier part of this judgment. It is abundantly plain that there was nothing connected with this second petition that could in any way have induced the respondent to refrain from putting an end to his desertion had he had the slightest desire to do so.

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My Lords, in my opinion, the desertion by the respondent without cause that began in the year 1925 continued to be desertion without cause uninterruptedly down to the filing of the third and present petition in March, 1938. I would, therefore, for the reasons that I have given allow the appeal. The orders of Hodson J. of January 18, 1939, and of the Court of Appeal of May 2, 1939, should be discharged; and the case should be remitted to the Probate, Divorce and Admiralty Division to make a decree nisi for the dissolution of the marriage between the appellant and the respondent.

Appeal allowed.

Solicitors for appellant: *Percy Bono & Griffith.*
Solicitor for Attorney-General: *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* LOWRY (INSPECTOR OF TAXES) . . . . APPELLANT;

AND

CONSOLIDATED AFRICAN SELECTION TRUST, LIMITED . . . . RESPONDENTS.

1940

Feb. 20, 21, 22, 26, 27; May 8.

Revenue—Shares issued by company at par to employees—Shares standing at premium—Claim by company to deduct amount of premium from profits and gains—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II.*

The respondent company being desirous of showing appreciation of the services rendered to it by the members of its staff allotted 6000 shares to them at their face value of 5*s.* each. The market value of these shares at the date of allotment was 2*l.* 3*s.* 9*d.* per share, and therefore if the shares had been issued in the open market the company would have received a premium of 1*l.* 18*s.* 9*d.* per share, making a total of 11,625*l.* On a claim by the company to deduct this sum in computing their profits for income tax purposes:—

Held, by Viscount Caldecote L.C., Viscount Maugham, and Lord Russell of Killowen—Lord Wright and Lord Romer dissenting, that the respondents had neither transferred money nor money's worth to the members of the staff, and therefore the sum in question could not be treated as a disbursement or an expense which could be deducted in computing their profits.

Russell v. *Town and County Bank* (1888) 13 App. Cas. 418, and *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433 distinguished.

Observations by Lord Sumner in *Usher's* case (supra) commented on.

Decision of Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

The directors of the respondent company having passed a resolution authorizing the chairman and vice-chairman to allot and issue 6000 ordinary shares to employees, a letter in the following terms was sent to certain members of the staff: "The directors desire to show their appreciation of special "services you have rendered to the company by giving you an "opportunity to acquire a share interest in the company on

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

"favourable terms. If you will kindly fill up and return to the "secretary the enclosed form of application for   shares, "together with a remittance for £   , being payment in full "at par, namely, 5*s.* per share, you will in due course receive "an allotment." In response to that letter applications were made for the whole of the 6000 shares, and payment was made in full, and on July 2, 1934, allotments were made and certificates issued to the applicants. On that day the market price of the ordinary shares was 2$\frac{3}{16}$*l.* to 2¼*l.*, making a middle market price of 2*l.* 3*s.* 9*d.* It was therefore calculated that if the new shares had been issued in the open market, a premium at the rate of 1*l.* 18*s.* 9*d.* would have been received, amounting to a total of 11,625*l.*, this amount representing the difference between the middle price of the shares in the open market and the sum paid on allotment. The respondent company claimed to deduct this sum in computing their profits for income tax purposes, but this being refused by the income tax authorities, the company appealed to the Commissioners for the General Purposes of the Income Tax for the City of London, who allowed the appeal. Thereupon the Inspector of Taxes applied for and obtained a case for the opinion of the High Court, and that was heard by Macnaghten J., who reversed the decision of the Commissioners, and gave judgment for the appellant. On appeal to the Court of Appeal the judgment of Macnaghten J. was reversed, whereupon the Inspector of Taxes appealed to this House.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the appellant. The question is whether when a company issues shares to its employees at par, which, if they had been sold in the open market would have fetched a premium, the company, in computing its profits and gains for income tax purposes, can deduct the amount of that premium. We submit that it cannot do this, inasmuch as there was no disbursement by the company and no loss suffered. The fact that the employees to whom the shares were allotted received money's worth could be taxed in their hands is quite irrelevant to the question before the House. The trading receipts of the company were in no way diminished by the transaction. It has been suggested that the company parted with a valuable asset and that the employees received it. That is not so. The company parted with no asset, and what the employees received had no real connection with that parted with by the company. Each of the employees who acquired shares became the owner of a separate part of the capital which was different from that possessed by the company: see per Lord Wrenbury in *Bradbury* v. *English Sewing Co., Ld.* (1) The case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) has no relevancy. Moreover, the observations of Lord Sumner were obiter and should not be applied except in relation to land. *Russell* v. *Town and County Bank* (3) and *Smith* v. *Lion Brewery Co., Ld.* (4), were considered in *Usher's* case (2), and in none of them was any general doctrine about foregoing an advantage laid down; indeed, no suggestion of such a principle being applicable is traceable. *Hilder* v. *Dexter* (5) establishes that the advantage which the allottee of shares at less than their market value gets is neither money nor money's worth belonging to the company. It follows, therefore, that the non-receipt of a premium which might have been obtained cannot be treated as an expense incurred by the company.

J. Millard Tucker K.C. and *Terence Donovan* for the respondents. The company parted with money's worth, and it is a fundamental principle that where this is shown there is a right to deduct. The shares in question were given to the employees as part of their remuneration and thus they received money's worth: *Hilder* v. *Dexter* (5) in effect overruled *Burrows* v. *Matabele Gold Reefs and Estates Co., Ld.* (6), but there was no question of overruling the principle stated by Rigby L.J. that shares are worth to a company what they will bring. There need not necessarily be a disbursement in the strict sense so long as it can be shown that a sum should be allowed as a deduction in a profit and loss account. Here the respondents, to their financial detriment, issued shares to their employees

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(1) [1923] A. C. 744, 767.
(2) [1915] A. C. 433.
(3) (1888) 13 App. Cas. 418.
(4) (1910) 5 Tax Cas. 568.
(5) [1902] A. C. 474.
(6) [1901] 2 Ch. 23, 34.

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for the purposes of its trade, and therefore they are entitled to make the deduction they seek in arriving at their profits.

Sir Terence O'Connor S.-G. in reply. The terms on which the shares were issued to the employees clearly show the voluntary character of the transaction. The company parted with nothing, and therefore the pre-requisite for making a deduction is lacking.

The House took time for consideration.

1940. May 8. VISCOUNT CALDECOTE L.C. My Lords, this appeal from a judgment of the Court of Appeal, which was delivered by Sir Wilfrid Greene M.R. allowing an appeal from Macnaghten J., raises a difficult question concerning the computation of the profits of a trade carried on by a limited company. The respondent company, which carried on the business of searching for and winning diamonds, was incorporated on October 11, 1924, under the Companies Acts, 1908 to 1917, with a nominal capital of one million shares of 5*s.* each. By a special resolution passed at an extraordinary general meeting of the company on December 6, 1933, the capital of the company was increased by the creation of a number of preference shares and also of 400,000 new ordinary shares of 5*s.* each, out of which 10,000 shares were to be reserved for issue to employees of the company at such time or times and upon such terms and conditions as the directors should determine. Six months later the directors passed a resolution authorizing the chairman and vice-chairman of the company to allot and issue on such terms and conditions as they should determine up to a total of 6000 ordinary shares to employees under the special resolution of December 6, 1933. Accordingly a letter was written on June 15, 1934, to certain members of the staff of the company in the following terms: "The directors desire to "show their appreciation of special services you have rendered "to the company by giving you an opportunity to acquire a "share interest in the company on favourable terms. If you

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"will kindly fill up and return to the secretary the enclosed "form of application for shares together with a remittance "for £ being payment in full at par namely 5*s.* per share, "you will in due course receive an allotment."

In response to this invitation applications were made for the whole of the 6000 shares so offered and payment was made in full. On July 2, 1934, allotments were made and certificates issued to the applicants. On that day the market price of the ordinary shares was $2\frac{3}{16}$*l.* to $2\frac{1}{4}$*l.*, making a middle market price of 2*l.* 3*s.* 9*d.* It was, therefore, calculated that if the new shares had been issued in the open market, a premium at the rate of 1*l.* 18*s.* 9*d.* would have been received amounting to a total of 11,625*l.*, this amount representing the difference between the middle price of the shares in the open market and the sum paid on allotment. The respondents claim to deduct this sum in computing their profits for income tax purposes.

One other fact appearing from the special case must be stated. The employees of the company resident in England who received these shares were assessed to income tax under Sch. E on the premium value of the shares on the footing that they were paid this amount as remuneration for their services. The assessment was justified, as the Master of the Rolls pointed out in his judgment, by the law as declared in the case of *Weight* v. *Salmon.* (1) It was there decided in your Lordships' House that the profit which the taxpayer in that case was in a position to make by going on the market and selling shares allotted to him on payment of less than the market price, was an immediate profit in the nature of money's worth received by him. The employees of the respondent company have in the same way been treated as receiving money's worth, to the extent of the premium value of the shares, and have been assessed accordingly. Whether the directors intended that this should be the result of their offer of shares to their employees on the terms contained in the letter of June 15, 1934, may be open to some doubt. It is at least as likely, if attention is paid to the terms of the letter, that the directors really intended to give their employees a chance of acquiring a share interest in the company at a favourable price so that they might have what is sometimes called a " stake " in the company with the success of which their own interests were so closely connected. If the wish of the company had been that their employees should be remunerated by receiving shares which could be turned into cash, the simple course of making a direct payment of an equivalent amount of cash would have produced precisely the same result. The payments could no doubt have been made out of the ordinary resources of this prosperous company. If some special provision of funds to meet the payments were required, shares to the necessary amount could have been issued on the open market at the full price obtainable. This course would have allowed the company without question to treat the payments as trading expenses, and to deduct them from its gross receipts in making up its trading account. The company chose to take another course which did not involve any expenditure of its money, or realization of any of its assets. It was perfectly entitled to take that course, even though the result might have been to divert into the pockets of its employees the equivalent of the cash profit, which it might otherwise have obtained. In fact, the company did not obtain the cash profit. It is none the less said on its behalf that it is entitled to make up its trading account as if it had expended a sum of money equal to the premium value of the shares in the remuneration of its employees.

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(1) (1935) 51 Times L. R. 333; 19 Tax Cas. 174.

I find no guidance from the fact that the employees have had to pay income tax on the premium value of their shares. The assessment on the employees was on the ground that holding an office or employment of profit they received a profit therefrom: the right to include a deduction of the amount in question in the trading account of the company for the purposes of Sch. D must be justified by a finding that the company incurred a trading expense. The question, therefore, which has to be decided is whether, by reason of the fact that the company did not make use of the opportunity of issuing shares at a premium, the company can be said to have incurred a trading expense to the amount of the premium.

Now, my Lords, it is to be observed that the learned counsel for the respondents was insistent at the outset of his argument in disclaiming any intention to base his case upon the contention that the profit on the shares was foregone and could therefore be deducted as an expense. The foundation for such an argument is to be found, if at all, in some observations by Lord Sumner in his speech in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) Those observations, which were cited at length by the Master of the Rolls, were as follows: " A trader who utilises, for the purposes of his "trade, something belonging to him, be it chattel or real "property, which he could otherwise let for money, seems "to me to put himself to an expense for the purposes of his "trade. Equally he does so if he hires or rents for that "purpose property belonging to another. The amount of "his expense is prima facie what he could have got for it "by letting it in the one case, and what he pays for it when "hiring it in the other. Where he gets something back for "it, while employing it in his trade, by receiving rent or hire "for it in connection with that trade, the true amount of "his expense can only be arrived at by giving credit for "such receipt. In principle, therefore, I think that in the "present case rent foregone, either by letting houses, which "the brewers own, to tied tenants at a low rent instead of to "free tenants at a full rack rent in the open market, or by "letting houses in the same way, which they hire and then relet "at a loss, is money expended within the first Rule applying to "both of the first two cases of Schedule D." In view of the disclaimer by the respondents' counsel of any intention of basing his case on the argument that a " profit was foregone " in the present case, it is unnecessary to say more about the propositions contained in the passage I have quoted from Lord Sumner's speech than that they may require very careful examination if they are relied on as having the authority of your Lordships' House. The Master of the Rolls, however,

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(1) [1915] A. C. 433, 469.

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did not refer to these observations for the purpose of supporting the argument which counsel for the company was at pains to disclaim. On the contrary, the Master of the Rolls expressly rejected the argument. I agree with him, so far as I understand the argument, but in any case the word " foregone " as used by Lord Sumner was no more than an apt word to describe the result of a simple arithmetical calculation, namely, the deduction of amounts of the rent received by the brewery company from amounts of the annual value or of the rent paid by the brewery company in respect of premises used by the brewery company in selling its liquor. It is clear that any attempt to build upon the use of the expression " rent " foregone " any such argument as was, apparently without justification, fathered by the Crown on the respondents' counsel must fail.

It is said, however, that the decision in *Usher's* case (1), supported and explained as it is by the case of *Collyer* v. *Hoare & Co., Ld.* (2), was based upon a broad principle which is applicable to the present case. The argument is that the company parted with money's worth in issuing the shares at par to the employees, or, to use the words of the Master of the Rolls, the company " has remunerated its "employee to its own financial prejudice by giving to its "employee the power which it had itself of obtaining a "monetary sum in respect of these shares." This view of the facts is said to warrant the conclusion on the authority of *Usher's* case (1) that the respondents are entitled to make the deduction in question. It is therefore necessary to examine *Usher's* case (1) to see whether it really is an authority for this proposition.

The facts of *Usher's* case (1) are familiar. The brewery company owned or rented houses in order to provide places in which the company's liquor could be sold. So far as the freehold houses were concerned, the annual value for the purposes of Sch. A was treated as an expense incurred by the company. In the case of the leaseholds, the rent paid, which as Lord Loreburn pointed out was not other than the proper annual value, was an obvious item of expense. Both freeholds and leaseholds were let as tied houses at rents less than the annual value, and the difference was claimed by the brewery company to be a permissible deduction. What is now r. 3 of the Rules applicable to Cases I. and II. of Sch. D, with its prohibition of certain deductions, had on those facts to be considered. Lord Parker (1) called attention to the three points decided on the construction of the rule in the case of *Russell* v. *Town and County Bank* (2): first, that the annual value or rent of premises used wholly for the purposes of the trade is a proper deduction in ascertaining the balance of profits and gains; secondly, that the effect of the prohibition now contained in r. 3 (*c*) could not be extended by implication to cover a deduction which would otherwise be a proper deduction; and thirdly, that what is now r. 3 (*a*) does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, though the annual value is not money expended in the ordinary sense of the word. Applying that construction, your Lordships' House decided that the deduction claimed was properly made in ascertaining the balance of profits and gains. The brewery company was treated in the case both of its freehold and of its leasehold premises as incurring an outlay. The deduction of the outlay, once it had been decided to have been incurred, was no more than an application of the elementary principle stated by Lord Herschell in the case of *Gresham Life Assurance Society* v. *Styles* (3): "Profits are "ascertained by setting against the income earned the cost "of earning it." With the greatest respect to the Court of Appeal I am unable to find any principle laid down in *Usher's* case (4) which can be applied to the facts of the present case, even assuming that the view of those facts taken by the Master of the Rolls was the one which commended itself to me.

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(1) [1915] A. C. 433.
(2) (1932) 17 Tax Cas. 169; [1932] A. C. 407.

I come back to the facts of this case, and I ask whether the issue of these shares in the manner adopted involved the respondent in any "disbursements or expenses . . . . wholly "and exclusively laid out or expended for the purposes of" its trade. Its capital was intact after the issue of the shares: not a penny was in fact disbursed or expended. Its trading receipts were not diminished, nor do I think it is a right view of the facts to say that the respondent gave away money's worth to its own pecuniary detriment. The company was entitled to issue its shares at par. It did so, and the company never received, and never elected to receive, anything more than the par value of the shares. Quite apart from any desire to let the employees have a share interest in the company, the directors might have had very good reasons for deciding not to issue shares to the company's employees at a price which could only be justified by an expectation of very high dividends over a long period of time.

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(1) [1915] A. C. 433, 460.
(2) 13 App. Cas. 418.
(3) [1892] A. C. 309, 321.
(4) [1915] A. C. 433.

I am fortified in this view by the opinion of Lord Davey in the case of *Hilder* v. *Dexter*. (1) In that case the appellants had subscribed to shares in a company with an option to take further shares at par. The shares rose to a premium and the appellants desired to take them up. Lord Davey's speech contains the following passage: "The argument seems to "be that the company, by engaging to allot shares at par "to the shareholder at a future date, is applying or using its "shares in such a manner as to give him a possible benefit "at the expense of the company in this sense, that it foregoes "the chance of issuing them at a premium. With regard to "the latter point, it may or may not be at the expense of "the company. I am not aware of any law which obliges a "company to issue its shares above par because they are "saleable at a premium in the market. It depends on the "circumstances of each case whether it will be prudent or "even possible to do so, and it is a question for the directors "to decide."

I should very much regret it if the law was not what, in the light of Lord Davey's opinion, I conceive it to be. If, in the circumstances of this case, the company must be held to have suffered a financial detriment, or in other words to

(1) [1902] A. C. 474, 480.

have incurred an expense, solely by reason of the fact that it did not issue its shares at a premium, very far reaching results might follow in many cases in which for one reason or another an opportunity of securing some financial advantage is not used. That, however, does not in any way affect or alter the view I take of this case on the facts. The plain fact as it appears to me is that the cost to the company of earning its trading receipts was not increased by the issue of these shares at less than their full market value.

In my view this appeal should be allowed and I move accordingly. As to costs I observe that leave to appeal was given on condition that the order of the Court of Appeal directing that the Crown should pay the costs of the hearing in the King's Bench Division and in the Court of Appeal should not be disturbed and that the Crown should pay the respondents' costs in your Lordships' House in any event. Although I should be reluctant to interfere with the discretion of the Court of Appeal as to the conditions on which leave to appeal should be given, I venture to think no injustice would have been done in this present case if the matter of costs had been dealt with in the ordinary way.

VISCOUNT MAUGHAM. My Lords, this is an appeal from an order of the Court of Appeal allowing an appeal by the respondents from an order made by Macnaghten J. The matter arises upon a case stated by the Commissioners for the General Purposes of the Income Tax for the City of London. The Court of Appeal, allowing the appeal to them, reversed the decision of Macnaghten J. and restored the decision of the Commissioners.

It is unnecessary to repeat the special case, and in the view I take of the appeal it is unnecessary to travel into some of the matters discussed in the Court of Appeal and before your Lordships. The material facts are as follows: The company (as I shall call the respondents) was incorporated in 1924 and its main business has been that of searching for and winning diamonds and selling them. Its original capital was 250,000*l.* divided into 1,000,000 shares of 5*s.* each. It has been very successful. On December 6, 1933, by a special resolution the capital of the company was increased to 600,000*l.* by the creation of 250,000 redeemable preference shares of 1*l.* each and 400,000 new ordinary shares of 5*s.* each, and it was resolved that 10,000 of such new ordinary shares be reserved for issue to employees of the company at such time or times and upon such terms and conditions as the directors should determine. By letter dated June 15, 1934, and sent to certain members of the staff, the chairman of the company stated that the directors desired to show their appreciation of special services which certain members of the staff had rendered to the company "by giving" those members "an "opportunity to acquire a share interest in the company on "favourable terms." The shares were standing in the market at a premium, but were offered by the letter at par. In all 6000 shares in the company, pursuant to the offer in the letter, were applied for at par (namely, at 5*s.* per share) by these employees, and in due course they were allotted to them. The 6000 shares, of course, formed a part of the 10,000 of the shares reserved for issue to employees, as I have stated; and it is not wholly immaterial to note that the directors were not entitled to do anything except to issue them to employees.

The shares of the company at that time were quoted in the market at 2*l.* 3*s.* 9*d.* per 5*s.* share; and the premiums on 6000 shares would have amounted to 11,625*l.* If then the 6000 shares had been allotted to the public at the price of 2*l.* 3*s.* 9*d.* per share, the company would on that footing have received the sum of 13,125*l.*, and it is said that if it had then distributed the premiums, namely, 11,625*l.*, as a bonus to the employees to whom the shares were in fact allotted, the company would in that case have been entitled to be allowed that sum as a proper expense or deduction in computing its profits and gains under Sch. D for the year in question. Neither of those things happened, and what we have in effect to consider is whether since the company has not in fact received any part of the sum of 11,625*l.*, the premiums which the company might have got and expended, but never did get or expend, can be treated as an expense or deduction laid out or expended in some artificial but legitimate sense for the purpose of the trade of the company. This is a rather difficult proposition to establish in the affirmative. We are invited to consider something which did not take place; and it is to be remembered that in *Blott's* case (1) this House declined to be influenced by the argument that the case before it was the same as if the shareholders had received the bonus and paid it back to the company to be retained as capital. The simple answer was that they never received it at all. (2)

The same answer might I think be given here. The hypothetical view of the facts is not here the true one. The plain object of the company, as the resolution and the letter of June 15, 1934, show, was to give to the employees in question "an opportunity to acquire a share interest in "the company on favourable terms." The directors were making use of their powers to enable this to be done. The terms were favourable in order to make sure that the offer would be accepted. The advantage to a trading company or a business firm of an arrangement as the result of which employees get a stake in the concern is one which has been dilated upon for the past hundred years. It is a false view of the transaction to regard it merely as a present of money or money's worth. The company, it is true, parts with a right, since shares once issued cannot (except in cases of forfeiture) be issued again; but the nature of this right must now be considered.

In my opinion this appeal largely turns on the nature of the right of a company to issue its shares at any price and on any conditions it thinks fit, provided that it does so in good faith for the benefit of the company and does not issue them at a discount: see *Hilder* v. *Dexter*. (3) Upon an issue of shares the assets of the company are increased by the amounts obtained from the subscribers. These amounts are obviously not profits or gains of the trade, and they are not liable to be brought into the accounts for income tax. It may be said that these amounts are of the nature of capital, but I prefer for the present purpose to say that beyond all doubt they are not profits and gains arising or accruing from a trade, for that goes directly to the question which arises under Sch. D. What I have said is equally true whether the shares are allotted at par or at a premium. The sum of 11,625*l.* which in this case the company might hypothetically have received for premiums was not an item in its profits and gains. In the ordinary course such a sum would be carried to a reserve account in the balance sheet; but carrying it to some account in the profit and loss account would not have affected the matter. It would not be an item of profit of the trade. Indeed the issue of shares by a limited company is not a trading transaction at all. The corporate entity becomes pro tanto larger; but the receipts of the trade on the one hand and the amount of the costs and expenditure necessary for earning these receipts on the other remain unaltered; and it is the difference between these two sums which is taxable under Sch. D. It is well settled that profits and gains must be ascertained on ordinary commercial principles, and this fact must not be forgotten: *Gresham Life Assurance Society* v. *Styles* (1); *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (2)

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(1) [1921] 2 A. C. 171.
(2) Ibid. 184, 194, 200.
(3) [1902] A. C. 474.

There is one other fact of importance which must be borne in mind. It is that the company was not discharging a debt or liability to the employees when it isssued the 6000 shares to them at par. The word "remuneration" has been more than once mentioned in this case as if it described the advantages which the employees were obtaining by the issue, and I think it has led to some confusion. If money or money's worth in any form, whether from capital or income, is given to an employee in discharge of an ordinary trading obligation or debt due to him incurred in the course of the trade and is accepted as such, I am quite ready to accept the view that the amount of the debt or liability so discharged will find its way into the profit and loss account on ordinary commercial principles and will pro tanto reduce the profits for the year for income tax purposes. A man's salary with his consent can be paid in meal or malt as well as in money, and that salary is one of the items of expenditure which go to reduce the amount of the profits and gains. If in this case the employees were paying the par value of the shares and also releasing to the company some amounts of salary due to them the case would be very different from what it is. All we really have before us is that the company has chosen to issue 6000 shares at par to the employees and that they have received the benefit of that issue. There is really nothing more. The employees have given up nothing. The company has not lost or parted with any asset. It has a fewer number of shares remaining for issue ; but of course it can create as many more as it pleases. There is here in my opinion no transaction of trade at all, nor an item of any kind that ought to be carried to either side of the profit and loss account. If the company, apart from the issue of the 6000 shares, made a profit of half a million in the year in question, I am myself wholly unable to understand how it can be said that that profit has been reduced to the extent of a farthing (much less 11,625*l.*) by reason of the fact that the company has 6000 fewer shares to issue to the public. The company cannot, even if it would, deal in its own shares, and the latter do not partake in any sense of the nature of stock in trade. The issue of shares by a company, whether at par or over, does not affect the profits or gains of the company for the purposes of income tax.

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(1) [1892] A. C. 309, 316, 321. (2) [1915] A. C. 433, 458.

My Lords, if there were no authorities to be considered and if the Court of Appeal had not expressed a different view from mine, I should have been tempted to leave the matter there ; for in its essence I think it is only necessary in this case to ascertain the profits and gains on ordinary commercial principles. But out of respect to the Court of Appeal I must now deal, I fear at some length, with some at least of the matters and the cases which have as I think led them to a wrong conclusion.

I think it is clear that the premiums obtained on an issue of shares are not items of receipt in the account of profits and gains. It must then be asked, what is the event which

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is alleged in this case to entitle the respondents to treat the amount of these premiums as a disbursement or expense wholly and exclusively laid out or expended for the purposes of the trade (r. 3 of the Rules applicable to Cases I. and II.)? The contentions of the taxpayer are set out in para. 13 of the case stated. It is said in effect that the amount of the premiums is " an amount foregone " by the taxpayer because the shares were issued at less than their market value to the employees as " remuneration " for their services, or, alternatively, that if the company had issued the shares in the open market it could have utilized " the premiums " for the purpose of paying " the aforesaid remuneration," and could then have debited the amount for the purpose of computing its profits for income tax purposes. These are I think quite distinct reasons. To the first I think the short answer is that an " amount foregone " is not (with one special exception) deductible, and that there is no principle under which such a sum can be treated as a disbursement or expense of the trade. To the second the reply is that you must look at the events which have happened, not those which never happened, and that there is nothing to show that the premiums in question will ever be obtained by any one either in the year of assessment or in any subsequent year.

The first point seems to be founded on an expression used by Lord Sumner in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) The material question—material for our consideration—in that case was whether a brewery company which had, wholly and exclusively for the purposes of its trade, acquired licensed houses which it let to tied tenants at rents substantially lower than their full letting values, was entitled to deduct as expenses incurred in earning its profits the differences between the Sch. A assessments and the rents paid by the tenants. Lord Sumner observed (2): "A trader who utilises, for the purposes of his trade, something "belonging to him, be it chattel or real property, which he "could otherwise let for money, seems to me to put himself "to an expense for the purposes of his trade." A little lower on the same page he says: "In principle, therefore, I think "that in the present case rent foregone, either by letting "houses, which the brewers own, to tied tenants at a low "rent instead of to free tenants at a full rack rent in the "open market, ... is money expended within the first "rule applying to both of the first two cases of Schedule D." My Lords, with all respect to the memory of a great judge, I cannot help saying that the reference to "chattels" in the first sentence must be due to a slip, and, moreover, I do not think the sentence in its wide form can possibly be supported. None of the other speeches gave any countenance to it, and it was certainly not necessary for the decision of the appeal. The second sentence contains the words "rent "foregone," but I think the words in their context mean only rent which might have been but was not actually received. The decision, so far as it concerned the point as to a deduction for rents, was in truth governed by the previous decision of this House in *Russell* v. *Town and County Bank.* (1) I am spared the duty of stating the results of that case because Lord Parker in *Usher's* case (2) stated with his usual lucidity and acuteness the three points on the construction of the Rule applicable to Cases I. and II. which were decided in *Russell* v. *Town and County Bank.* (1) The third point decided was that "the first part of the rule" (3 (*a*)) "which prohibits "deductions for disbursements and expenses, not being money "wholly and exclusively expended for the purposes of the "trade, does not preclude a deduction for the annual value "of premises used wholly for the purposes of the trade, *though "such annual value is not money expended in the ordinary sense "of the word*" (the italics are mine). The main reason for this decision, surprising as it is at first sight, is to be found in Lord Herschell's speech in *Russell* v. *Town and County Bank.* (3) It depends on the particular provisions of the Income Tax Acts. "It is quite true," Lord Herschell said, "that, strictly speaking, the annual value where the premises "are owned and not rented, is not money laid out or expended

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(1) [1915] A. C. 433. (2) Ibid. 469.

(1) 13 App. Cas. 418.
(2) [1915] A. C. 460.
(3) 13 App. Cas. 425.

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"for the purposes of the trade; but it is admitted, and must, "I think, have been admitted, that in either the one way "or the other, that deduction is to be made, because inasmuch "as it is clear that even in the case of a dwelling-house a "part of which is used for purposes wholly unconnected with "the trade, the annual value of the portion which is used "for the purposes of the trade is to be deducted" (that is, under r. 3 (*c*)), "it is evident that it can never be contended "that in the case of premises used not for the purpose of a "dwelling at all but exclusively for trade purposes, the annual "value is not to be deducted." This reason is, I think, decisive, but it seems to me to be beyond doubt that there is no ground for extending this artificial and unusual construction of the rule to anything beyond the annual value of premises exclusively used for business purposes, and that *Usher's* case (1) has no application in the present appeal. The ground of the decision, as Lord Herschell's speech in the earlier case clearly showed, is limited to premises used exclusively for the purposes of the business. I do not understand how the reasoning of those cases can throw any light upon the present case, and I am unable to agree with the Master of the Rolls that *Usher's* case (1) is laying down some broad, though undefined principle which may extend to all sorts of cases in which the taxpayer has "foregone" a profit. Where are we to stop? If a company chooses to make a sale of goods at cost price to a subsidiary company, is the former to be allowed to make a deduction of the difference between market value and cost price in its profit and loss account on the ground that it is profit foregone? I do not believe any one would so contend; but for myself I am unable to think of any concrete example of a "profit "foregone" in relation to goods and chattels or services rendered which would stand the test of justifying the deduction on ordinary business principles.

If we turn to the second point it is to be observed that it is only in an exceptional case that either the Crown or the subject is entitled to claim on the basis of a transaction which has not taken place. There are no doubt cases where, for example, a payment in cash is deemed to be the result of an accord and satisfaction. You need not pass cheques backwards and forwards across a table. But we have nothing of that kind here. The company was issuing the shares at par without any juggling with cheques: it was a plain straightforward offer and acceptance of shares at par followed by an allotment. It is said by the Master of the Rolls that the company has remunerated its employees to its own financial prejudice by giving to them the money's worth of the premiums on the shares allotted to them. I would prefer to say "has made a present to its employees." The words "to its own financial prejudice" do not, I think, advance the argument, for all they mean is that certain shares have been issued at par while they might have been issued at a higher price. How does that lead us to the conclusion that moneys have been "laid out or expended" for the purposes of the trade? For myself I do not think the premiums which might have been obtained are "money's "worth" in the sense in which those words are generally used, that is, as an equivalent for cash paid by the company; and in my opinion that view is supported by the case I must next refer to. But whether or not that is so, I repeat that in this case the sum of 11,625*l.* which the company never obtained was not in any sense laid out or expended for the purposes of the trade.

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(1) [1915] A. C. 433.

My Lords, I think this House in the case of *Hilder* v. *Dexter* (1) decided by necessary inference that although a premium obtained by a company on an allotment of its shares is obviously money belonging to it and is prima facie part of the capital of the company, nevertheless the advantage which an allottee of shares at less than the market value of the shares obtains is not either money or money's worth belonging to the company nor is it part of the capital of the company. That was a decision on s. 8, sub-s. 2, of the Companies Act, 1900. Lord Halsbury took the responsibility for its drafting (2); but I cannot say that the section is

(1) [1902] A. C. 474. (2) Ibid. 477.

an example of lucidity, and it is necessary to study the case with some care to discover precisely what was being decided. The first sub-section of s. 8 states the conditions under which a company might pay a commission to a person in consideration of his agreeing to subscribe for shares. It required disclosure and provided a limit of the amount. The second sub-section stated shortly runs thus: "Save as aforesaid, "no company shall apply any of its shares or capital money "either directly or indirectly in payment of any commission ". . . . whether the shares or money be so applied by being "added to the purchase-money of any property acquired by "the company or to the contract price of any work to be "executed for the company, or the money be paid out of "the nominal purchase-money or contract price or otherwise." The section therefore prohibits the payment of such a commission out of shares of the company or money coming from the allotment of shares in the company and out of any money belonging to the company with, however, the possible exception of the earned profits of the company. Lord Davey's speech, concurred in by Lord Halsbury and Lord Robertson, shows this quite clearly, though he does not mention the possible exception I have referred to. He points out that the words "apply any of its shares or capital "money" include money derived from the issue of shares. (1) A little lower down the same page he observes that the company in the case before the House was not indeed "parting . . . . with any moneys belonging to it" (the company). He then had to deal with the words "directly or "indirectly." The argument was that this prevented the company from "applying or using its shares in such a manner "as to give" the person promising to subscribe for shares "a possible benefit at the expense of the company in this "sense, that it foregoes the chance of issuing them at a "premium." Here we come across precisely what is said in this case. Lord Davey, however, deals with the point by saying that there is no law "which obliges a company to "issue its shares above par because they are saleable at a

(1) [1902] A. C. 480, line 7.

"premium in the market," and that "the benefit to the "shareholder from being able to sell his shares at a premium "is not obtained by him at the expense of the company's "capital." If this House had regarded the transaction as one in which the company was giving "money's worth" in the sense of an equivalent for cash in consideration of the promise to subscribe for shares the decision would have been the other way. The words "directly or indirectly" would have been in point.

On the other hand, there is no doubt at all that a man who gets a share standing in the market at 2*l.* 3*s.* 9*d.* for the sum of 5*s.* is himself getting an advantage of considerable value. The point of *Hilder* v. *Dexter* (1) for the present purpose is that he is not getting it in any true sense at the expense of the company, though no doubt the company has foregone the chance of making a profit which, as I have pointed out above, would usually be treated as capital.

The decision of this House in *Salmon* v. *Weight* (2) is also invoked by the respondents. It was there held that directors could properly be assessed on the premium value of shares in their company for which they had been given the privilege of subscribing. Since the allottee at par of shares standing at a premium is plainly getting an advantage capable of being turned into money, it is easy to arrive at the conclusion, if Sch. E applies to him, that the market value of the shares less the amount he pays is within the wide words of r. 1 of that Schedule—"Salaries, fees, wages, perquisites or profits "whatsoever." I can see no difficulty in that case; but I have a difficulty in appreciating its application to the one before us. It depended on the language of the Rules applicable to Sch. E, while the problem which arises under Sch. D seems to me to be a very different one, since it concerns profits of a trade and is subject to a large number of prohibitions as to the deductions which alone are permissible and on other statutory rules of some complexity.

It is of course clear that if a company owing, say, 500*l.*

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(1) [1902] A. C. 474.

(2) (1935) 51 Times L. R. 333; affirming *Weight* v. *Salmon* (1934) 151 L. T. 410.

to an employee for his contractual salary agrees to deliver to him so many tons of coal or any other marketable commodity in discharge of the 500*l*., the company would then be entitled to deduct the 500*l*. as an expense. I only mention this for the purpose of remarking once more that it is not the present case. A number of other questions have been raised as regards the giving of coal and other commodities to employees. I do not wholly agree with what the Court of Appeal has said in relation to those matters; but I do not think they arise on the present appeal, and for my part I think it will be wiser not to express an opinion on them.

In conclusion I return to the view which I expressed earlier in this judgment. A company, generally speaking, can issue its shares at any price it likes, not being less than par. This is not a trading transaction, and does not in any way affect its gains and profits under Sch. D. In the present case the shares were issued at par to certain employees in order to give them an interest in the company, but not in payment of any sum contractually due to them. In these circumstances the respondents have failed to establish that any sum has thus been expended or laid out for the purpose of the trade of the company.

My Lords, it follows in my opinion that the appeal should be allowed.

LORD RUSSELL OF KILLOWEN. My Lords, the respondents in this case claim that, in computing the profits of their trade assessable to income tax, there should be deducted a sum which they have not disbursed, and in respect of which they have incurred no liability.

I will not recount all the facts; they have already been stated. I must, however, call attention to one important matter. The claim is made upon the footing that the sum in question represents remuneration paid by the respondents to their servants, but the transaction as evidenced by the documents does not, I think, warrant this terminology. The sum in truth represents the premium on certain shares which the respondents might have issued to the public at a price above par, but which they elected to offer to their servants at par, in order to induce them to become shareholders, and therefore, servants directly interested in the welfare of the company. That is an accurate description of the transaction. The hope and intention were that the servants should keep the shares. No doubt the servants had it in their power to sell and obtain a premium from their purchasers. No doubt too they, or such of them as were liable to income tax, would be taxable on the benefit which accrued to them from the allotment at par. These, however, are considerations irrelevant to the question which we have to determine, namely, whether the respondents are entitled to deduct as a trade expense a sum equivalent to the premium at which the respondents might, had they so chosen, have issued the shares.

The Court of Appeal answered this question in the affirmative, but in my opinion the deduction is not permissible. I have considered with care the judgment delivered by the Master of the Rolls. It rests, I think, on two foundations; one that the respondents transferred money's worth from themselves to their employees; the other that upon the authority of *Usher's* case (1) the premium which the respondents elected not to obtain, was a " profit foregone " which they were entitled to enter on the expenses side of their trading account in ascertaining their trading profits. It is true that the Master of the Rolls emphatically disclaims any assertion of the general proposition that money foregone is money expended, but the exact limits within which the proposition may apply are not very clearly marked.

There is no difficulty about the cases, indicated in the course of the judgment, in which a servant is remunerated in kind. The value of the " kind " must be deducted in ascertaining the profits of the trade, subject, however, to this, that if the "kind" is part of the trader's stock in trade further entries must be made in the account if it is desired to ascertain the profit made by the realization of all the stock in trade realized; for the "kind" which is applied at its value in remunerating the servant, is stock in trade realized just as much as if sold at that

(1) [1915] A. C. 433.

value to a customer. The value of the "kind" should, I think, be included in the receipts as representing a realization at the value at which it discharges pro tanto the servant's salary, and the expenses should include, in addition to the cost of the whole stock in trade, an item representing the whole amount of that salary. I am throughout assuming that the cost is lower than the market value. But transactions such as that do not represent what in fact happened in this case. Here the respondents in my opinion parted with nothing; they transferred no asset of theirs to the servants. The power of a limited company to issue and allot shares is not an asset of the company; it is only a power to increase its issued capital and, it may be, the number of the corporators. It is not bound to issue its shares for more than their nominal value. The words of Lord Davey in *Hilder* v. *Dexter* (1) may be quoted: ". . . . "the argument seems to be that the company, by engaging to "allot shares at par to the shareholder at a future date, is "applying or using its shares in such a manner as to give him a "possible benefit at the expense of the company in this sense, "that it foregoes the chance of issuing them at a premium. "With regard to the latter point, it may or may not be at the "expense of the company. I am not aware of any law which "obliges a company to issue its shares above par because they "are saleable at a premium in the market. It depends on the "circumstances of each case whether it will be prudent or even "possible to do so, and it is a question for the directors to "decide. But the point which, in my opinion, is alone material "for the present purpose is that the benefit to the shareholder "from being able to sell his shares at a premium is not obtained "by him at the expense of the company's capital."

I am of opinion that the first basis of the judgment of the Court of Appeal fails because the respondents transferred neither money nor money's worth to their servants; they merely elected not to obtain more than the nominal value of the shares in order to induce the servants to become shareholders in the company. I cannot hold (apart from compelling authority) that such action by the respondents is, or may be treated as, a

(1) [1902] A. C. 474, 480.

disbursement or an expense; or that the premium which the servants could, if they wished, obtain from purchasers of their shares, is or may be treated as money laid out or expended by the respondents for the purposes of the respondents' trade.

It is, however, said that compelling authority does exist in the decision of your Lordships' House in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1); and I now proceed to consider this question.

The matters there in debate, which are relevant to the present case were two, namely (1.) the freehold tied houses which the brewery let to tenants at rents lower than the Sch. A assessment, and (2.) the leasehold tied houses which the brewery sub-let to tenants at rents lower than the rents paid by the brewery to the freeholders. It was held that the brewery could, in ascertaining its profits, charge as an expense (in the first case) the difference between the rents paid by the tenants, and the Sch. A assessment, and (in the second case) the difference between the rents paid by the tenants and the rents paid by the brewery. In other words, the receipts side of the account included the smaller sums of rent received by the brewery while the expenditure side included the larger sums representing (*a*) the annual value of the freeholds, and (*b*) the rents paid by the brewery. Three things may here be noted, namely (1.) so far as concerns the leaseholds the position seems to present no abnormal features; it is a plain case of entering actual income and actual outgoings; (2.) the great difficulty arose as to the freeholds in regard to which no actual disbursement or expense was made or incurred by the brewery, which could be described as money laid out or expended for the purposes of the trade; and (3.) it was never suggested that anything beyond the Sch. A assessment (e.g. the amount of a potential rack rent) could be charged as an expense. It is in regard to the decision concerning the annual value of the freeholds that I propose to consider the case.

This House decided that the annual value could properly be entered as an expense or (to put it in other words) that the difference between the larger amount of the brewery's assessment under Sch. A, and the smaller amount of the rent received from the tied tenant was deductible in ascertaining the brewery's profits for the purposes of income tax.

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(1) [1915] A. C. 433.

It is important to see how this result was achieved because it is upon the authority of *Usher's* case (1) that the Court of Appeal has relied. Just as in *Usher's* case (1) "rent foregone" was held to be money wholly and exclusively expended by the brewers, for the purpose of the trade, so it is said, the premium here foregone by the respondents is money wholly or exclusively expended by them for a similar purpose. Such as I read the judgment, is the view expressed.

Usher's case (1), when examined, will prove to be founded, and I think entirely founded, on the earlier decision of this House in *Russell* v. *Town and County Bank, Ld.* (2) Lord Parker of Waddington, in *Usher's* case (1) said in terms that it was covered by that decision. The question there was whether in ascertaining the profits of a bank the annual value of the whole of bank premises was deductible including that part of them in which the bank manager resided. The difficulty of treating the annual value as a disbursement or expense or as money laid out or expended for the purpose of the trade was fully appreciated, but the difficulty was overcome, and it was treated as a permissible deduction, by reason of the fact that the provision of the 1842 Act (which corresponds with the present r. 3 (*c*) of the Rules applicable to Cases I. and II. of Sch. D) showed that in appropriate circumstances annual value might be deducted. Lord Herschell made this clear when he said (3): "It is quite true that, strictly speaking, the "annual value where the premises are owned and not rented, is "not money laid out or expended for the purposes of the trade, "but it is admitted, and must, I think, have been admitted, "that in either the one way or the other that deduction is to be "made, because inasmuch as it is clear that even in the case "of a dwelling-house a part of which is used for purposes "wholly unconnected with the trade, the annual value of the "portion which is used for the purposes of the trade is to be

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(1) [1915] A. C. 433.
(2) 13 App. Cas. 418.
(3) 13 App. Cas. 425.

"deducted, it is evident that it can never be contended that "in the case of premises used not for the purpose of a dwelling "at all but exclusively for trade purposes, the annual value is "not to be deducted. The annual value is, therefore, to be "deducted somehow. It is to be deducted either by taking it "as an element before arriving at the balance of profits and "gains, or as included in a very broad construction of the "provision relating to disbursements and expenses."

Having thus laid the foundation of the right to deduct the annual value of premises wholly used for bank purposes, Lord Herschell then held that the fact of the bank manager residing in part made no difference, because that part too was used for the purposes of the bank's business, and further that the premises in question were not a dwelling-house within the special statutory provision in that behalf. As I read the decision the right to deduct the annual value of land used for the purposes of trade, whether as a necessary element in arriving at the balance of profits and gains of the trade, or as included under a broad construction of disbursements and expenses, is based upon and justified by the existence of the express provision now represented by r. 3 (*c*).

Both cases are decisions dealing with the ownership by the trading company of land in which r. 3 (*c*) or its predecessor came into consideration as a reason for allowing the annual value to be treated as a permissible deduction. Neither is an authority extending beyond that, and in my opinion *Usher's* case (1), founded as it is on *Russell* v. *Town and County Bank, Ld.* (2), does not justify the deduction which is claimed by the respondents. It is true that the language used by Lord Sumner, and quoted by the Master of the Rolls, is far reaching, and extends even to chattels; indeed, if taken literally it would lead to some startling results. The other members of this House who took part in the debate use no such wide language and I, for one, am not prepared to extend the decision so as to cover the wholly different facts of the present case. Both these decisions relate to the annual value of land, to which peculiar considerations are applicable, and I am

(1) [1915] A. C. 433. (2) 13 App. Cas. 418.

unable to see how the reasoning in either of these two decisions of your Lordships' House can be applied to a case like the present, in which the claim is to deduct a sum which never came into existence because the respondents, in order to achieve a desired result, elected to issue some shares at their nominal value.

As a last argument, it was urged that apart from *Usher's* case (1), and the rules, the deduction was permissible on general commercial principles. I do not agree. If the respondents had issued the shares at a premium, no trace of the transaction would appear in the profit and loss account. I find difficulty in understanding how on any principle, commercial or otherwise, you may, by electing not to get a sum, become entitled to charge as an expense in your profit and loss account the amount of the sum, which, if you had got it, could not have been included therein as a receipt.

I am of opinion, for the reasons which I have endeavoured to indicate, that this appeal should succeed.

LORD WRIGHT. My Lords, the question in this appeal is whether the respondents are entitled to deduct as an expense from their profits, or, to state it differently, as a proper item in the ascertainment of the balance of profits and gains in the year of charge, the difference between the market value and the par value of 6000 shares which they allotted to certain of their employees as extra remuneration. The Court of Appeal, agreeing with the experienced City Commissioners, but reversing the decision of Macnaghten J., have held that they were so entitled. Save for the difference of opinion which has emerged among your Lordships, I should have been content without more to express my concurrence with the judgment of the Court of Appeal delivered by the Master of the Rolls, which to my mind is (subject to some immaterial reservations or differences in emphasis) convincing and satisfactory. But as things are I feel I ought to explain my reasoning at some length out of respect to those who take a different view.

The respondent company, which is engaged in the diamond

(1) [1915] A. C. 433.

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business, has been prosperous and its shares, the par value of which were at the material time 5*s*. a share were able to command in the market a price of 2 3/16*l*. or 2¼*l*. when the new issue, of which the 6000 shares in question formed part, was made. The case finds that the value of the remuneration for services represented by this issue of 6000 shares to the employees was accordingly calculated at 11,625*l*., based on the middle price of the day, namely, 2*l*. 3*s*. 9*d*. less 5*s*. a share paid by the employees. This is a finding of fact by the Commissioners, upon which they upheld the contention of the respondents that they were entitled to debit this sum in arriving at the balance of their profits and gains, the Commissioners having further held that this offer of the shares to the employees was solely in the interest of the company. Whether or not the allotment was thus made by way of remuneration, is a question of fact. I do not think it is competent for the House to go behind it. In the course of the hearing before your Lordships it was said that there was no evidence to justify the finding of fact and further that the idea of remuneration was excluded by the terms of the letter in which the directors offered the shares, as fully paid at 5*s*. a share, in order to show their appreciation of the employees' special services by giving them an opportunity of acquiring a share interest in the company on reasonable terms. But that letter is consistent with the Commissioners' finding that the offer was by way of remuneration, even though it was not merely a reward for past services but had the further object of stimulating future efforts. But even if the latter were the sole element, and even if the word remuneration were not appropriate, it would not in my opinion affect the question whether the deduction was admissible. The deduction, if in other respects allowable, would be allowable as an outlay or expense incurred solely in the interest of the respondents' trade.

But for the divergence of opinion which has emerged, I should have been clear in my mind that the 11,625*l*. claimed as a deduction was properly so claimed. If the respondent company had arranged with certain of their employees to satisfy their salary or part of it to the aggregate extent of 11,625*l*. by the allotment of these shares at 5*s*. instead of charging the market price, I do not see how it could be contested that the 11,625*l.* was deductible as a trade expense. It would pro tanto wipe off trade debits for wages just as much as if it had been utilized to discharge any other indebtedness. Each employee by the allotment of the fully paid shares, would be paid what was due to him to the extent of the difference between 5*s.* a share and the market value. He in truth receives a share or chose in action worth 2*l.* 3*s.* 9*d.*; though he has to pay 5*s.* for each share (because the company cannot issue the shares at less than par) that is really a deduction from the gross value which he receives, so that he is only paid, in the hypothesis imagined, 1*l.* 18*s.* 9*d.* in respect of each share. I shall not express the position as being that he obtains the power to realize a profit of 1*l.* 18*s.* 9*d.* What he gets is the share and all the rights which it involves. He may realize it and turn it into cash, or keep it as an investment for income or appreciation. The payment of 5*s.* a share does not make the position in essence different from what it would be if the salary were being paid by a transfer of shares in a subsidiary company which were held by the respondents and which they could transfer without any payment at all. The only difference is that in such a case the full market value of the shares and not the market value less 5*s.* a share, could be reckoned as the sum paid.

I cannot see any distinction between the case supposed where the shares are used to discharge a pre-existing debt for salary and where they are utilized to pay a bonus or extra remuneration. No doubt in the former case, the value attributable to the share is expressly liquidated on the footing of the amount of the debt. In the case of the bonus remuneration, the amount of the bonus is only determined by ascertaining what is the value to the employee of the share which he receives, which in the present case is the market value less 5*s.* a share. But I see no difference. In fact, the recipient is taxed on precisely this basis, as in respect of profits of his office. This practice which was followed in the present case, has the authority of this House in *Salmon* v. *Weight* (1), where directors who had been allotted at par by way of remuneration fully paid shares which stood at a premium in the market, were taxed on the difference between the market value and the par value. The question from the point of view of the recipient who is taxed under Sch. E is obviously different from that of the company on its profits under Sch. D. But it is at least clear that the recipient does obtain a profit. In my opinion this profit so obtained was in the facts found at the expense of the respondents (if I may use the word in its ordinary business sense) and even though in other cases as Lord Davey points out in *Hilder* v. *Dexter* (1), the benefit which the recipient obtains may or may not be at the expense of the company in the sense that it foregoes the chance of issuing them at a premium. Lord Davey says: "I am not aware of any law "which obliges a company to issue its shares above par because "they are saleable at a premium in the market. It depends on "the circumstances of each case whether it will be prudent or "even possible to do so, and it is a question for the directors to "decide." In the present case any question of this nature is disposed of by the findings in the special case which states that the directors could have issued the shares in the open market at a premium, but offered them at par to the employees solely in the interests of the respondents' trade.

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(1) 51 Times L. R. 333.

The respondents have parted with an asset at one-tenth of its value in order to further the interests of the company. The case states at what price they could have sold the shares in the market. Most people would say that they gave them away, treating the 5*s*. a share as merely a mitigation of what would otherwise be a free transfer, or the difference between the 5*s*. a share and its market value may be regarded, to borrow Lord Atkin's phrase from *Salmon* v. *Weight* (2) as a notional sum paid in order to remunerate the employees or as a sacrifice made to promote the company's trading. However it is put, the benefit which the employees receive by having the shares at 5*s*. a share, is at least in the facts of this case correlated with the corresponding expense incurred by the respondent company when they allotted the shares on these terms. It may be that

(1) [1902] A. C. 474, 480.

(2) 51 Times L. R. 333.

this would be clearer if the difference were being used to pay a debt as for definitely stipulated wages. But I can see no difference in principle. No doubt in that event as a matter of bookkeeping the debt would appear on one side and the difference in value on the other side. But similarly here the extra remuneration paid should appear on one side and the difference in value on the other side of the account. It has been notionally received on capital account, and is being utilized on revenue account, just as would have been the case if it had been used to pay an ordinary debt. It is true that unissued shares are not an asset in any sense of the company. What value they have only comes when, and by the fact that, they are issued, just as a deed has no value or indeed existence until it is signed, sealed and delivered, or a negotiable instrument until it is issued. Unissued share capital was described by Lord Davey in *Hilder* v. *Dexter* (1) as potential capital. The power to issue further capital is only a potentiality. But the fact of issue makes it actual capital, and creates the fasciculus of rights and liabilities between the company and the shareholder which flow from the share when issued. If the share stands at a premium, the directors prima facie owe a duty to the company to obtain for it the full value which they are able to get. It is true that it is within their powers under the Companies Acts to issue it at par, even in such a case, but their duty to the company is not to do so unless for good reason. Normally they would transfer the difference between the market value and the par value to a premium reserve or similar capital account. But they could justify issuing the share at par on the ground that the difference has been utilized to secure a benefit to the company, as here by paying the extra remuneration to the employees and it may be also by giving them an interest in the company. In my opinion when the directors did so the company was incurring an expense on revenue account deductible as such under Sch. D in order to assess the balance of profits and gains. This is so none the less because the premium if acquired would not have been a trading profit but a receipt on capital account.

I think there is authority in this House which in principle and precisely covers this conclusion. I refer in particular to *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), where it was held that a trading company which had transferred an interest of value at less than its full value, in order to advance its trade, was entitled in estimating the balance of its profits and gains, to claim to deduct the difference between the full value and the amount which it thus received, as being an expense necessarily earned for the purpose of earning the profits. The trade in question was that of a brewery company. In the ordinary course of that trade, the company was either owner or lessee of licensed houses which it let to "tied" tenants, who, in consideration of the tie, paid a rent less than the full annual value. It was the difference between the rents and the full annual values which the company was held to be entitled to deduct as an expense of the trade under the Rules applicable to Cases I. and II. of Sch. D. Lord Loreburn shortly summed up the position (2): "On ordinary principles of commercial trading "such loss arising from letting tied houses at reduced rents is "obviously a sound commercial outlay." In the same way, in the present case the loss involved in allotting the shares at less than their market value for the purposes found by the Commissioners is a sound commercial outlay which the respondent company are entitled to bring into account. Lord Atkinson stated (3): "This is only another way of saying that the "appellants let their tied houses at low rents solely and "exclusively for the purpose of promoting their trade and "enhancing the profits of it." Later on (4) he compared what would have been the position if the brewery company instead of putting in a tenant into the tied house had put in a manager. In the latter case, on the authority of *Russell* v. *Town and County Bank* (5), the full annual value of the house would have been deductible. "But," Lord Atkinson proceeded (4), "the "balance of the profits and gains of the brewer's trade would, "according to the methods of practical business men, be "ascertained in the same way in both cases, i.e., by deducting

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(1) [1902] A. C. 474, 480.

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(1) [1915] A. C. 433.
(2) Ibid. 446.
(3) Ibid. 451.
(4) [1915] A. C. 457.
(5) 13 App. Cas. 418.

"from the receipts what it costs to earn them. Part of the cost "to the brewer is, in the manager's case, his salary, and "possibly a discount on profits. In the case of the tenant it is "the difference between the annual value of his, the brewer's, "freehold house and the rent he receives for it, and in his "leasehold house the difference between the rent he receives "for it and the rent he pays for it, if that be equal to the full "annual value under Sch. A. For for the purposes of striking "the balance of profits and gains the two cases are in principle "indistinguishable." I draw special attention to these last words as showing conclusively that nothing turned on any feature peculiar to landed interests in Sch. A. Earlier in his speech (1), Lord Atkinson said: "If he" [the trader] "abstains "from letting his premises and devotes them to the purposes "of his trade, he must be taken to have dedicated to that trade "a sum equivalent to the annual sum which he might have "obtained in the shape of rent if he had let them to an untied "tenant." It is true that in that case the trade was different and the subject-matter was different, but the difference between the brewer's trade and the diamond merchant's, and between the letting of houses and the allotting of shares must not be allowed to veil what in my opinion is the identity in principle. The undervalue deliberately incurred was a dedication of an equivalent sum to the purposes of the trade. Lord Parker spoke to the same effect. He pointed out that the brewers were claiming to deduct the difference between the Sch. A assessment and the rent they received, or the difference between the rent they paid and the rent they received, the former applying when they are freeholders and the latter when they are leaseholders. "In other words," he said (2), "they "claim the Sch. A assessment value or the rent they pay "as a deduction, giving credit on the other side of the account "for the rent paid by the tenants of the tied houses." He held that they were right in their contention, because it was a deduction not precluded by the first rule applicable to Cases I. and II., and necessary to ascertain the balance of the profits and gains in any true sense of that expression. But he added that "the right to make the deduction, however, must of course "carry with it the obligations to give credit for the rents "received from the tenants of the tied houses." I think notwithstanding certain objections which I shall consider later, that this decision does in principle precisely apply to the case now in question. The brewers were letting their houses at an undervalue in order to promote their trade. They were held entitled to a deduction of the true value, subject to allowance for the rent which they actually received. Here the respondents are parting with their shares at an undervalue for the purposes of their trade. They are accordingly, it seems to follow, entitled to a deduction of the market value of these shares, subject to an allowance for the par value which they actually receive. The sacrifice in *Usher's* case (1) was of the rents, in the present case of the market value of the shares, less in either case the credits. The fact that Sch. A applies to property in land does not, in my opinion, affect the position, save that the annual value under Sch. A takes the place of market value. Lord Sumner put this principle very clearly where he said (2): "Next as to the rent. "A trader who utilises, for the purposes of his trade, something "belonging to him, be it chattel or real property, which he "could otherwise let for money, seems to me to put himself to "an expense for the purposes of his trade. Equally he does so "if he hires or rents for that purpose property belonging to "another. The amount of his expense is prima facie what he "could have got for it by letting it in the one case, and what he "pays for it when hiring it in the other. Where he gets some"thing back for it, while employing it in his trade, by receiving "rent or hire for it in connection with that trade, the true "amount of his expense can only be arrived at by giving "credit for such receipt."

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(1) [1915] A. C. 452.

(2) Ibid. 463.

If the "expense" of letting houses at an undervalue for purposes of the trade is a deductible expense under Sch. D, I cannot see why in principle the expense of allotting shares at an undervalue for purposes of the trade should not equally be deductible under Sch. D.

But it was objected that *Usher's* case (1), like *Russell's*

(1) [1915] A. C. 433. (2) Ibid. 469.

case (1), which to a certain extent it followed, related to rent, and that the principle enunciated in these cases was not general, but was limited to deductions in respect of rent. It was sought to maintain this proposition by reference to the Rules applicable to Cases I. and II. of Sch. D. The contention was that this House decided the two cases referred to not on any general principle but on the specific terms of the rules which relate to rent or annual value. In the Acts before 1918 these rules were for practical purposes identical with what is now to be found in r. 3 (*c*) and in r. 5, and I shall accordingly refer to the modern rules. Rule 3 (*c*) deals with the rent or annual value of a dwelling-house and prohibits any deduction in that respect except for such part as is used for the purposes of the trade or profession, etc., of the person claiming the deduction. Rule 5 provides that the computation of the tax shall be exclusive of the profits and gains arising from (or since 1927 of the annual value of) lands, tenements, and so forth, occupied for the purpose of the trade or profession, etc., of the person being assessed, and separately assessed under Sch. A. I may note in passing that in *Usher's* case (2) the tied tenant, not the brewers, were occupiers of the premises. After a careful study of the rule and of these two authorities I can find nothing to justify putting this limited interpretation on the principles laid down. I do not wish to repeat all that was said on this point by Lord Herschell in *Russell's* case (1), or by the various Lords, especially Lord Parker, in *Usher's* case. (2) The rules do certainly present a curious example of draftsmanship. The governing principle, however, is that the assessment is to be on the balance of the profits and gains. Rule 1 provides that the tax shall be charged without any deduction other than is by the Act allowed. Rule 3 (*a*) is the most general in its terms: "No sum shall be deducted in "respect of any disbursements or expenses, not being money "wholly and exclusively laid out or expended for the purposes "of the trade, profession, employment or vocation." One major question debated both in *Russell's* case (1) and *Usher's* case (2) was whether there could be a deductible expense

(1) 13 App. Cas. 418. (2) [1915] A. C. 433.

when there was no outlay in money, but merely the sacrifice or surrender of something of value wholly for the purpose of the trade. This was true of the rent of the manager's residence in *Russell's* case (1), where the whole rent was foregone, and of the rent in *Usher's* case (2), where only a part was foregone. The decision was in both cases that the money value of the rent foregone was deductible, and that in *Usher's* case (2) the partial payment made no difference, save that the amount deductible had to be reduced pro tanto. Lord Herschell in *Russell's* case (3) after examining the rules thus concluded: "The annual value" [of the premises occupied by the bank manager] "is . . . . to be deducted somehow. It is to be "deducted either by taking it as an element before arriving at "the balance of profits and gains, or as included in a very broad "construction of the provision relating to disbursements and "expenses." Lord Herschell means in that phrase that there is a disbursement or expense within the rule though not in a literal sense, since money has not been expended. In *Usher's* case (4) Lord Parker arrived at a similar conclusion. He dealt with the prohibition against any deduction for the rent or value of a dwelling-house except such part as is used for the trade, and points out that the rule refers only to a dwelling-house occupied by the person to be assessed. He summed up the position thus: "In other words, the effect of the "prohibition cannot be extended by implication to cover a "deduction for rent or annual value which would otherwise "be a proper deduction in ascertaining the balance of profits "and gains." He states his general view of the law on this point (5): "The better view, however, appears to be that, "where a deduction is proper and necessary to be made in "order to ascertain the balance of profits and gains, it ought "to be allowed, notwithstanding anything in the first rule or "in section 159" [of the Act of 1842] "provided there is no "prohibition against such an allowance in any of the subsequent "rules applicable to the case." In my opinion Lord Parker was clearly deciding the case on general principles, not on any particular feature attaching to rent or annual value. Lord Sumner expressed this view quite specifically in the passage I have quoted. Lord Loreburn's reference to "sound commercial "outlay" again put the principle. So also did Lord Atkinson in the passage I have quoted. The particular analogy he drew between the manager's salary and the reduced amount of rent shows that he was enunciating a general principle.

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(1) 13 App. Cas. 418.
(2) [1915] A. C. 433.
(3) 13 App. Cas. 418, 425.
(4) [1915] A. C. 460.
(5) Ibid. 458.

In *Hoare & Co., Ld.* v. *Collyer* (1) the principle in *Usher's* case (2) was considered by this House, the issue being whether the loss by brewers on the lettings of some tied houses could be set off against the profit on others. This House decided against such aggregation of gains and losses. But all their Lordships summed up the effect of *Usher's* case (2) in substantially the same terms. I shall quote the language of Lord Atkin (3): "Whether the expense allowed in *Usher's* "case (2) is based upon a deduction of the Sch. A valuation "as on premises used in the brewers' business, mitigated by "the sum received from the tied tenant, or whether it is "regarded as a notional sum paid for the advantage of the tie, "it is allowed as an expense incident to the particular house "in respect of which it is incurred. It in no way differs from "expenses for repairs or compensation levy or insurance "premiums on particular houses such as are also authorised "by the same decision." Lord Tomlin said (4): "In *Usher's* "*Wiltshire Brewery, Ld.* v. *Bruce* (2), where tied houses of a "brewery company were held by the tenants at rents below "the Sch. A valuations, your Lordships' House, as I understand the case, treated the difference between the rent and "the valuation in the case of each house as rent foregone, or "money spent exclusively for the purpose of earning profits, "and held that expense to be one which could be deducted "for the purpose of ascertaining profits and gains under "Sch. D." The other Lords who took part in the appeal spoke to the same effect. It is difficult to see what Sch. A has to do with this kind of question, except as fixing the limit

(1) [1932] A. C. 407.
(2) [1915] A. C. 433.
(3) [1932] A. C. 416.
(4) Ibid. 419.

of annual value. Sch. A deals with the assessment of the charge on the landholder. The deductions now being considered are deductions under Sch. D in respect not of landowning but a trade or business. The two schedules are disparate and distinct.

One other case I must refer to, that of *Salmon* v. *Weight.* (1) I regard that case as the counterpart of the present, though it is not a direct authority because the question there turned on the different language of Sch. E. It dealt with the position of the recipient, not the payer. The company there had allotted shares to its directors at par, which was considerably below their market value. As the allotment was found to be by way of extra remuneration for their services, it was held that the directors (or at least the director who was concerned in the case) were taxable in respect of the value of that remuneration under r. 1 of Sch. E. Lord Atkin, in whose speech the Lords concurred, said that the difference between the price paid and the value of the shares was an immediate profit in the nature of money's worth, and put as an analogy a case where a director of a colliery company himself engaged in the coal trade was given the privilege of buying coals at one-third of their market price. That would clearly be a profit or perquisite of the office. But, as the Master of the Rolls observed in the judgment appealed from, it would be a startling inconsistency to say that the director was to be taxed because he was receiving by way of remuneration money's worth at the expense of the company, and yet that the company which was incurring the expense for purposes of its trade to remunerate the directors was not entitled to deduct that expense in ascertaining the balance of its profits and gains, whether the matter is dealt with as an expense under the specific Rules applicable to Cases I. and II. under Sch. D, a course which would be justified by the opinions expressed in *Usher's* case (2), or alternatively under the general right to deduct expenses according to the ordinary principles of commercial trading.

Now it is true that in certain cases an employee who has received a benefit from his employment may not be assessable

(1) 51 Times L. R. 333. (2) [1915] A. C. 433.

in regard to the value of it. Thus in *Tennant* v. *Smith* (1), a bank manager or agent, who was in the same position as the manager or agent in *Russell's* case (2), was held not to be assessable in respect of the privilege of free residence, in particular because he was not free to dispose of that advantage or turn it into cash. Sch. E, said Lord Macnaghten (3), "extends only to money payment or payments convertible "into money," or in Lord Watson's words (4), "Money or that "which can be turned to pecuniary account." The decision of this House in *Weight's* case (5) clearly involves that the acquisition by the recipient of the shares involved a benefit convertible into money, that is, to the extent of the difference between the par value and the market value. It seems to follow that an equal sacrifice expressible in terms of money must have been suffered by the respondents. To that extent *Weight's* case (5) directly supports the respondents' case.

It was, however, contended that though the employee may profit, the company is at no expense and is not out of pocket when it issues shares at par, by way of remuneration or for a special purpose in the interest of its business, because the company is involved in no expense, since to allot shares at par, instead of at their market value, costs the company nothing. It is true that the directors would not be breaking any provision of the Companies Acts if they allotted shares at par instead of realizing their market value. They might do so for some legitimate reason, for instance, to give a bonus to the extent of the price difference to shareholders, or to remunerate employees, or to discharge a debt of any kind. Otherwise the shareholders might complain that by so issuing shares at less than the market value, the directors were wasting the assets of the company, if they were not getting something in return or had no good reason for so doing or at least did not bona fide think they had. It is, however, said that shares are not an asset of the company. I agree, as I have already observed, that unissued shares are not an asset of the company. But in Lord Davey's useful phrase in *Hilder* v. *Dexter* (1), they are potential capital. The company which has the right to issue them has a right which it can turn into money, and the amount of money which it can derive from the issue depends on the market. The question is not what the shares cost the company, but what they were worth to the company in the sense that it was open to the company to derive the full market value, either by selling on the market or by allotting at an undervalue as fully paid shares for some special consideration or object in the company's interest. No one, I imagine, would deny that if the company had been possessed of bonus shares in a subsidiary company, which had cost them nothing, the value to them of these shares was their market value, and that if the company used these shares to pay a debt or satisfy an obligation in the course of the company's trading, their value could be deducted in ascertaining the balance of profits and gains. I see no difference in principle between that case and the present.

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(1) [1892] A. C. 150.
(2) 13 App. Cas. 418.
(3) [1892] A. C. 163.
(4) [1892] A. C. 159.
(5) 51 Times L R. 333.

Hilder v. *Dexter* (1), in my opinion, either does not throw any light on the question whether in this case the company has incurred an expense or, perhaps more accurately, supports my view, for the reason which I stated in citing it above. The sole question there was whether an allotment of shares at par fell, on the facts of the case, within s. 8, sub-s. 2, of the Companies Act, 1900, which prohibited a company from applying either directly or indirectly any of its "shares or "capital money" to the payment of commissions and similar matters, save as provided in the Act. A shareholder who had taken up shares did so on the terms of an agreement that he should have the option at a later date of taking up a certain number of shares at par. He exercised the option when the market price was above par. The company fulfilled its contract and it was held that the section was not contravened. Lord Davey (2) construed the words "shares or "capital money" as meaning "its capital, either in the form "of shares before issue, when they may be described as "potential capital, or in the form of money derived from the "issue of its shares." He concluded: "the point which, in

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(1) [1902] A. C. 474.

(2) Ibid. 480.

"my opinion, is alone material for the present purpose is that "the benefit to the shareholder from being able to sell his "shares at a premium is not obtained by him at the expense "of the company's capital." This in my opinion is merely a decision on the particular words of the Act and affords no guidance in this appeal. Indeed it seems clear that in the events which happened the capital was not being reduced nor had there been any outlay of money, capital or otherwise, by the company nor any application of shares or capital money to the payment of commissions and so forth. The company was simply fulfilling its contract. The words of the Act are narrow.

I must not be taken to say that a profit foregone is in every case the same as an outgoing or expense, or that money's worth is always to be deemed to be the same as money. But I think that in the facts of the present case and for purposes of determining the deductions permissible for the respondents under Sch. D, both propositions may be asserted.

For all these reasons, which in substance are the same as those stated by the Master of the Rolls in the Court of Appeal, I think that the decision of the Court of Appeal was right. I regret that I find myself unable to agree with those of your Lordships who are of a different opinion.

LORD ROMER. My Lords, the findings of fact in this case by the Commissioners for the General Purposes of the Income Tax for the City of London are not as clear as could be wished upon the question of what was the object of the directors in making the allotment of shares to the employees of the respondent company. In para. 2 of the case the shares are said to have been allotted as "remuneration for "services." So, too, in para. 10. In para. 13, which sets out the contentions of the company, the difference between the par value and the market value of the shares is alleged to represent remuneration for the services of the employees, and no exception to this allegation appears to have been taken by the appellant in his contentions as they are set out in para. 14. Now that one of the objects of the directors in making the allotments was to remunerate certain of its employees for past services is made apparent by the directors' letter of June 15, 1934: "The directors," says the letter, "desire to show their appreciation of special "services you have rendered to the company, by giving you "an opportunity to acquire a share interest in the company "on favourable terms." It is plain, however, that there was much more in it than this. In para. 12 of the case the Commissioners refer to the evidence given by the secretary of the company, evidence which the Commissioners must be taken to have accepted as true. It included the following statement: "The offer of shares made by the directors to "the employees was solely in the interests of the respondents' "trade"; a statement that would hardly be made about an offer of shares merely in recognition of past services. It was, however, obviously in the interests of the company's trade that its employees should, by becoming shareholders, acquire an incentive to promote the success of the company, and the directors seem to have realized that, if the employees were to become shareholders, it would be advisable to offer them some inducement to do so. Hence the reference in the letter to the "favourable terms" offered to the employees in allowing them to take up the shares at par. If the shares were being offered merely in recognition of past services it would be a matter of indifference to the company or its directors whether the employees accepted the offer or not. One does not usually hold out inducements to a person to persuade him to accept a present.

In these circumstances the proper conclusion to be drawn from the facts set out in the stated case seems to me to be this: that in order to induce some of its employees to take up shares in the company the directors, in the interests of the company's trade, offered such employees at 5*s.* per share 6000 of its shares for which the directors could have obtained 2*l.* 3*s.* 9*d.* each from the public had they wished to do so. That such a transaction would have involved no breach of s. 45 of the Companies Act is plain. The company would not have applied any of its shares or capital money either directly or indirectly in consideration of the employees' subscription for the 6000 shares. See as to this *Hilder* v. *Dexter*. (1)

But the question to be decided upon this appeal is whether, in computing its profits for income tax purposes, the company is entitled to deduct an amount representing the difference between the par value and the market value of the 6000 shares, that being the benefit which accrued to the employees as consideration for their subscribing for the shares.

That the question is one of considerable difficulty is apparent from the fact that it has given rise to a difference of opinion between the Courts below and also between the members of this House. But, having given the matter my anxious consideration, I have formed a very clear opinion that the question should be answered in the affirmative.

My Lords, it has been laid down on more than one occasion by this House that, in order to ascertain whether in computing the profits of a trade for the purposes of Sch. D, Case I., of the Income Tax Act, a particular deduction is permissible, the profits must be ascertained on ordinary commercial principles by setting against the income earned what it has cost to earn it, provided always that, as regards each particular item of cost, its deduction is not expressly prohibited by the terms of the Act and Rules. It becomes necessary, therefore, to inquire in the present case whether, in ascertaining the profits of its trade on ordinary commercial principles, it would be permissible to deduct the sum in question as forming part of the cost of earning the company's income.

It must, of course, be conceded that the sum never formed part of the assets of the company. It was, nevertheless, a sum that could have been made an asset had the directors decided to issue the 6000 shares to the public at the market price. The company, therefore, had the power of acquiring such a sum. I have never consciously committed, and I trust that I may never commit, the great sin in a lawyer's eyes of confusing property with power. If a man has a general power of appointment over a sum of money, the sum does not strictly speaking form part of his assets. Should he release the power

(1) [1902] A. C. 474.

voluntarily, his assets will be in no way diminished. He will not have parted with a farthing. But he will nevertheless be the poorer for having released the power. So, too, in the case of a company whose shares stand at a premium in the market. The directors may, if they think fit, and if they act in good faith, issue the shares at par. In such a case they in effect voluntarily release the power of the company to acquire the premium. The company parts with none of its money; but it is nevertheless the poorer for the release. For not only does the company give up by the release the opportunity of adding to its assets a sum in cash, it also gives up the opportunity of utilizing the possession of the power for the purpose of adding directly to its stock in trade, or for the purpose of preventing a diminution of its existing assets. Where a company issues its shares at a premium, the premium is a receipt on capital account. It is not a trading profit and it is not chargeable with income tax. It can, nevertheless, be distributed as dividend among the shareholders, or spent in purchasing stock or machinery, or in any other way that the company thinks fit. But the company may equally well utilize its power of realizing the premium by purchasing (say) stock in trade, or by discharging a liability without any cash passing through its hands at all. If a company, for example, whose 1*l.* shares stand at 10 per cent. premium in the market buys goods of the value of 110*l.* by the issue of 100 fully paid shares to the vendor, the cost price of the goods to the company is 110*l.* If it then sells the goods for 130*l.*, its trading profit from the transaction (apart from working charges which can be disregarded) will be 20*l.* and not 30*l.* It will have made a total profit on the transaction of 30*l.*, but 10*l.* of this, representing the premium, will be entered as a receipt on capital account. The 20*l.* alone will be taxable.

A company, too, in the like circumstances, may discharge an existing trading liability of 100*l.* by the issue to its creditor of 1000 shares for a payment of 1000*l.* It will not have parted with the 100*l.*, but it will have utilized the power of realizing the 100*l.* premium by preventing its assets being depleted by that amount. The 100*l.* will accordingly be deducted from the trading account, pro tanto diminishing the taxable trading profit, and a similar amount must be credited in the books as a receipt on capital account.

It is to be observed in both these cases that, if the premium could be treated as a trading and taxable receipt, there would be no necessity to resort to this method of book-keeping. In the first instance, the cost of the goods could be entered as being 100*l.* only, and in the second instance nothing would be deducted in respect of the debt; and nothing in either case would be credited in respect of the premium. It is the fact that the premium is not a trading and taxable receipt that renders this " short circuiting " impossible.

Applying these considerations to the present case, it is obvious that the directors have utilized the possession of the power of realizing a premium of 1*l.* 18*s.* 9*d.* on each of the 6000 shares for the purpose of inducing their employees to subscribe at par for those shares and so become members of the company. It is found that this was done solely in the interests of the company's trade, which means that it was done solely for the purpose of enabling the company to earn its income. In these circumstances I should, but for the fact that some of your Lordships are of the contrary opinion, have thought it plain that in ascertaining the trading profits of the company on commercial principles the deduction now sought to be made was permissible as part of the cost of earning the company's income, a like sum being, of course, credited to its capital account.

It may be convenient at this stage to say something about a passage in the judgment of the Master of the Rolls in the present case that has been the subject of much misunderstanding. The passage in question is as follows: " If an "employer having two receptacles, one containing cash and "the other containing goods, chooses to remunerate his "employee by giving him goods out of the goods receptacle "instead of cash out of the cash receptacle, the expenditure "that he makes is the value of those goods, not their purchase "price or anything else but their value, and that is the "amount which he is entitled to deduct for income tax "purposes." It seems to have been thought that the Master of the Rolls was here suggesting that, for the purpose of ascertaining the profits of the employer's business made by the purchase and sale of such goods, the cost of the goods to the employer was to be treated as their sale value. The Master of the Rolls, of course, said nothing so absurd. If an employer having bought 100 tons of coal at 20*s.* per ton and having incurred no other expense than 10*l.* 10*s.* paid in cash to his clerk for salary, sells the coal for 30*s.* per ton, the profit of his trade is 39*l.* 10*s.* If, however, instead of paying the clerk in cash, he pays him by handing over to him 7 tons of coal worth 30*s.* a ton, and sells the remaining 93 tons at 30*s.* per ton, the result to the trader will obviously be the same as in the first case. But the amount that he will enter in his accounts in respect of the salary of his clerk will depend upon the way in which he chooses to keep his books. He may, if he likes, treat the 7 tons as having been sold to the clerk at 30*s.* a ton. In that case he will deduct 10*l.* 10*s.*, the value of the 7 tons, as an expense in respect of the clerk's salary. In this case, however, the sum that would have been realized had the 7 tons been sold at 30*s.* would have to be treated as a trading receipt. The employer could therefore, and no doubt would, " short circuit " the account by crediting himself with nothing in respect of the 7 tons and debiting nothing in respect of the salary. I have taken this example as it was one that the Solicitor-General placed before your Lordships for the purpose of showing that, in such a case as last supposed, no deduction could be made in respect of the clerk's salary. But the Solicitor-General was assuming that the employer " short circuited " the account. No further deduction could be made in that case in respect of the salary, for it would have already been deducted in account. The Master of the Rolls, on the other hand, was obviously assuming that the employer used the longer, and perhaps more accurate, way of keeping his accounts. In that case the value of the 7 tons of coal would properly be deducted as an expense. For the employer would have credited himself with that value as a trade receipt. The Master of the Rolls no doubt thought it was unnecessary to say so. And so it was.

Having arrived at the conclusion that the deductions in the present case would on commercial principles be permissible as part of the cost of earning the company's income, I must now inquire whether such a deduction is expressly prohibited by the Income Tax Act and Rules. I can deal with this matter quite shortly. The only rule that by any possibility can be regarded as prohibiting the deduction is r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D. But if the sum now in question is to be regarded as a disbursement or expense at all, it can only be done by treating the company by a stretch of the imagination as having received the sum and passed it on to the employees. In that case, however, the sum must be treated as money, and, as it would have been wholly and exclusively laid out or expended for the purposes of the trade, the deduction is not prohibited.

I should therefore have arrived at the conclusion that the deduction in question is permissible, even if there were no authority to be found in the books to lend support to that conclusion. There are, however, at least two decisions of your Lordships' House which appear to me to be direct authorities in favour of the view that I have endeavoured to express. They are *Russell* v. *Town and County Bank* (1), and *Ushers Wiltshire Brewery, Ld.* v. *Bruce.* (2) The facts in the first of these two cases, decided under the Income Tax Act, 1842, were as follows: A company carrying on the business of banking were the owners of the premises upon which the business was carried on, and those premises contained certain accommodation occupied as a dwelling-house by the manager of the bank. The company claimed to deduct, in estimating the balance of their profits and gains under Sch. D, the entire annual value of the bank premises, including the portion so occupied by the manager. The Crown, on the other hand, contended that the portion of the premises occupied for that purpose ought to be dealt with separately from the part used for the actual carrying on of the business and that no deduction ought to be allowed in respect of the annual value of the portion occupied by the manager as a dwelling-house. The point at issue, therefore, was, in effect, whether the deduction of this last-mentioned annual value was not forbidden by what at that time corresponded to the present r. 3 (*c*), it being admitted by the Crown that the annual value—i.e., the rent which the company might have received for the bank premises proper had they let the premises to a tenant—was a proper deduction. This admission was held by Lord Herschell to have been rightly made. He said this (1): " Now it is not disputed that the "annual value of premises exclusively used for business "purposes is properly to be deducted in arriving at the balance "of profits and gains. I am, of course, speaking, for the "moment, of premises which are not used in any way as a "place of dwelling, but are exclusively business premises. "But there may be a question where the right to make that "deduction is to be found. I am myself disposed to think "that it is allowed because it is an essential element to be "taken into account in ascertaining the amount of the balance "of profits. If not it can only be included by a very broad "extension of the terms actually used, as being a disbursement "or expense which is money wholly and exclusively laid out "or expended for the purposes of the trade." He then referred to the exception contained in the predecessor of r. 3 (*c*) (which was substantially the same as the exception contained in r. 3 (*c*)), but, as I read his judgment, merely as being confirmatory of the conclusion he had reached without that exception. If he had thought that the exception was itself an enactment impliedly justifying the deduction, he would have said so, and would not have given other reasons for arriving at his conclusion which seems to be based on quite general principles. The annual value of the part occupied by the manager was also allowed as a deduction, it being held that the part so occupied was not a dwelling-house

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(1) 13 App. Cas. 418.

(2) [1915] A. C. 433.

(1) 13 App. Cas. 425.

within the rule. Lord FitzGerald also based his decision on general principles relating to the ascertainment of profits, and made no reference at all to the rule relating to dwelling-houses. He said this (1): "'Profits,' I read on authority, "to be the whole of the incomings of a concern after deducting "the whole of the expenses of earning them, that is, what is "gained by the trade. The whole expenses of earning them "must mean, according to the Schedule, the whole expenses "incurred for the purposes of the business and nothing else. "But I come, upon the statement of facts, to the conclusion "that . . . . the whole premises were used for the purposes "of the business of the bank and the annual value of them "forms a proper deduction in estimating the balance of "profits . . . . That balance of profits is to be ascertained "after deducting the whole of the necessary expenses save "those which by negative provisions are excepted in the "statute." Lord Macnaghten said (2) that the deduction was "properly and necessarily made in estimating the profits "and gains of the bank which were chargeable with duty," and that there was nothing in the Rules applicable to Cases I. and II. under Sch. D prohibiting the deduction. He did not think that the house was a dwelling-house within the meaning of the rules. I would call attention to the word "necessarily" used by Lord Macnaghten.

I regard this case as a clear authority for the proposition that in computing the profits of a trade for income tax purposes a sum may be deducted as part of the cost of earning the receipts which has never in fact been paid or expended, but is something the receipt of which has been foregone for the purpose of the trade. In the particular case the company refrained from letting their premises, and so earning a profit, solely in the interests of their business. It was, therefore, proper and necessary on ordinary commercial principles to deduct from their receipts this profit that they might have made as part of the cost of earning such receipts; and there was nothing in the Act to render such deduction illegal.

(1) 13 App. Cas. 429.

(2) Ibid. 430.

My Lords, *Usher's* case (1) is, as I read it, another authority for the same proposition. The facts of that case are so familiar to your Lordships that I will not weary you with reciting them. It is sufficient to recall that the brewery company sought to deduct (amongst other things) the difference between the annual value in the case of freehold and the rent they paid in respect of leasehold houses on the one hand, and the rent received from their tied tenants on the other. Your Lordships are also familiar with the reasons given by this House for deciding that the actual cash disbursements made by the company in connection with the tied houses were allowable deductions upon ordinary commercial principles and not prohibited by the Income Tax Acts then in force. But the important thing to be noticed for the present purpose is that none of their Lordships who were parties to the decision drew any distinction between the freehold and leasehold properties, that is to say, between the rents paid for the leaseholds and the annual values of the freeholds. Both the annual values in the case of the freeholds and the rents paid in the case of the leaseholds were treated as forming part of the cost of the brewery business and for precisely the same reason, namely, that both the rents paid for the leasehold properties and the rents that would have been received for the freeholds had they been let, instead of being used for the business, formed part of the costs incurred in earning the receipts of the business, and that the deduction of them was not prohibited by the Act. Lord Loreburn, referring to both classes of property together, said (2): "On ordinary principles "of commercial trading such loss arising from letting tied "houses at reduced rents is obviously a sound commercial "outlay." Lord Atkinson, in holding that it was immaterial whether a manager or a tied tenant was put into occupation of the houses, said (3): "Part of the cost to the brewer is, "in the manager's case, his salary, and possibly a discount on "profits. In the case of the tenant it is the difference between "the annual value of his, the brewer's, freehold house and

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(1) [1915] A. C. 433.
(2) Ibid. 446.
(3) Ibid. 457.

"the rent he receives for it, and in his leasehold house the "difference between the rent he receives for it and the rent "he pays for it, if that be equal to the full annual value "under Sch. A. For for the purpose of striking the balance "of profits and gains the two cases are in principle undis"tinguishable." Lord Parker said (1): "The appellants "claim to deduct, in the one case, the difference between the "Sch. A assessment and the rent they receive, and in "the other case the difference between the rent they pay and "the rent they receive. In other words, they claim the "Sch. A assessment value or the rent they pay as a "deduction, giving credit on the other side of the account "for the rent paid by the tenants of the tied houses. I am "of opinion that they are also right in this contention." Lord Sumner dealt even more particularly with this absence of difference, for the purpose of estimating the costs of a business, between sums actually spent and sums that might have been received but were foregone for the purposes of the business. "Next as to the rent," he said (2), "a trader "who utilizes, for the purposes of his trade, something "belonging to him, be it chattel or real property, which he "could otherwise let for money, seems to me to put himself "to an expense for the purposes of his trade. Equally he "does so if he hires or rents for that purpose property "belonging to another." These observations exactly apply to the present case, if, as I have endeavoured to show in an earlier part of this judgment, there can be no difference in principle between utilizing property and utilizing a power for the purposes of a business.

It is plain from the passage that I have just cited from Lord Sumner's judgment that, in deciding in favour of the deduction of the annual values of the freeholds, he was not relying in the least upon any consideration peculiar to land or houses, or upon any implication that was to be drawn from the rule now represented by r. 3 (*c*). Nor did the other noble Lords. It appears, moreover, that neither Lord Atkinson nor Lord Parker, who were the only ones who

(1) [1915] A. C. 463.

(2) Ibid. 469.

referred to *Russell's* case (1), regarded that case as depending upon any such consideration. Lord Atkinson said that the decision in that case was obviously right and just, because, if the trader abstains from letting his premises and devotes them to the purposes of his trade, he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent if he had let them to an untied tenant. Lord Parker enumerated three points which he said had been decided in *Russell's* case. (1) Of these I need only mention the second, because that one alone dealt with the prohibition of deductions in respect of the annual value or rent of dwelling-houses. He said this (2): "Secondly, it decides that the rule refers only to a dwelling-"house or domestic offices, or part of a dwelling-house or "domestic offices, occupied by the person to be assessed; so "that the fact that a bank manager resides in part of the "bank premises does not bring that part of the premises "within the prohibition or prevent the whole premises from "being considered as used for the purposes of the trade." Now observe what follows: "In other words, the effect of "the prohibition cannot be extended by implication to cover "a deduction for rent or annual value which would otherwise "be a proper deduction in ascertaining the balance of profits "and gains." It is not that the rule permits the deduction by implication of the annual value or rent of a house that is not a dwelling-house. The point is that the rule does not prohibit that deduction, which is a proper one to be made on commercial principles.

My Lords, for these reasons, I would dismiss this appeal.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Freshfields, Leese & Munns.*

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(1) 13 App. Cas. 418.

(2) [1915] A. C. 433, 460.

[HOUSE OF LORDS.]

SOUTHERN FOUNDRIES (1926), LIMITED . APPELLANTS ;

AND

SHIRLAW . . . . RESPONDENT.

H. L. (E.)*

1940

Mar. 7, 12, 13; April 22.

Distinguished. READ v. ASTORIA GARAGE [1952] 1 Ch. 637

Company—Director—Agreement for employment as managing director for ten years—Articles of association—Article providing that, subject to any contract, a managing director was to be removable in same manner as other directors—Implied term that managing director be irremovable from position of director during fixed term—Implied term against altering articles as to permit removal.

Southern Foundries (1926), Ld. (hereinafter called " Southern "), by an agreement dated December 21, 1933, appointed the respondent, who was then a director, to be managing director for a term of ten years. Art. 91 of the company's articles of association provided that a managing director should " subject "to the provisions of any contract between him and the company "be subject to the same provisions as to . . . . removal as the "other directors of the company and if he cease to hold the office "of director he shall ipso facto and immediately cease to be a "managing director." Art. 105 gave the company power to remove a director before the expiration of his period of office.

In 1935 Federated Foundries, Ld. (hereinafter called " Federated "), which was a company formed to take over the shares of a number of companies, including Southern, acquired all the shares of that company. By a special resolution passed on April 17, 1936, the existing articles of association of Southern were abrogated and new articles adopted. Art. 8 empowered the Federated by an instrument subscribed by two directors and the secretary to remove any director of the company. Art. 9 provided, that a director need not hold a share qualification. The new articles incorporated a large part of Table A, including art. 68, which made a managing director's appointment subject to determination ipso facto if he ceased to be a director. On March 27, 1937, an instrument subscribed as above was delivered to Southern removing the respondent from the office of director, and the company thereupon treated him as ceasing to be managing director. The respondent commenced proceedings claiming damages as against Southern for wrongful repudiation of the agreement and as against the Federated for wrongly procuring, causing or inducing the company's breach of the agreement :—

Held (Viscount Maugham and Lord Romer dissenting), that it was an implied term of the agreement of December 21, 1933, that the Southern should not remove the respondent from his

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* *Present :* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

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SOUTHERN FOUNDRIES (1926), LD. *v.* SHIRLAW.

position as director during the term of years for which he was appointed managing director; that his wrongful removal was the Southern's act none the less because it required two acts and not one only for its accomplishment; and that in respect of the breach of the agreement the respondent was entitled to the damages awarded by the trial judge.

Per Lord Atkin. If a person enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an obligation on his part to do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.

Per Lord Porter. A company cannot be precluded from altering its articles of association, thereby giving itself power to act upon the provisions of the altered articles, but so to act may nevertheless be actionable if it is contrary to a stipulation in a contract validly made before the alteration.

Decision of Court of Appeal [1939] 2 K. B. 206 affirmed.

APPEAL from a decision of the Court of Appeal (1), affirming a decision of Humphreys J.

The Southern Foundries (1926), Ld. (hereinafter called the "Southern"), by an agreement dated December 21, 1933, appointed the respondent, Mr. Shirlaw, who was then a director of the company, to be managing director for ten years from December 1, 1933. Art. 91 of the Southern's articles of association provided that a managing director shall, "subject to the provisions of any contract between him and the company be subject to the same provision as to resignation or removal as the other directors of the company, and if he cease to hold the office of director he shall ipso facto and immediately cease to be a managing director." Art. 105 gave the Southern power to remove a director before the expiration of his period of office. In 1935 the second defendants, Federated Foundries, Ld. (hereinafter called "Federated"), formed to take over the shares of a number of other companies, including Southern, acquired all the shares of Southern. By a special resolution passed on April 17, 1936, the existing articles of Southern were cancelled and new articles adopted, which, by art. 8, empowered Federated by an instrument subscribed by two directors and the secretary to remove any director of Southern. Art. 9 provided that a director should not be required to hold a share qualification. The articles incorporated a large part of Table A, including art. 68, which made a managing director's appointment subject to determination ipso facto if he ceased to be a director. On March 27, 1937, an instrument duly signed by two directors and the secretary of Federated, was delivered to Southern, removing the plaintiff from the office of director, and Southern thereupon treated him as ceasing to be managing director.

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(1) [1939] 2 K. B. 206.

Mr. Shirlaw thereupon commenced proceedings, claiming damages as against Southern for their wrongful repudiation of the contract, and as against Federated for wrongly procuring, causing, and inducing Southern's breach of contract.

Humphreys J. awarded damages of 12,000*l.* as against both defendants, and the Court of Appeal (MacKinnon and Goddard L.JJ., Sir Wilfrid Greene M.R. dissenting) affirmed his decision.

The companies appealed to this House.

Valentine Holmes and *J. G. Strangman* for the appellants. The office of managing director was vacated by the extraordinary resolution. By the new articles adopted by the Federated the provision as to holding office was quite different from that applicable to Southern, the Federated being given the power both to appoint and to remove directors, and Table A was adopted with certain deletions. In March, 1937, Federated, acting under the power it had by virtue of the articles, removed the respondent from the office of director, and that involved his removal from the office of managing director. The question is, had the Federated the power to do this? We submit that it had. The majority of the Court of Appeal took the view that there was an implied term that the company should not alter its articles in a way detrimental to the respondent, but there is no ground for that assumption. Sect. 10 of the Companies Act, 1929, provides that "a company "may by special resolution alter or add to its articles": see also *Allen* v. *Gold Reefs of West Africa, Ld.* (1), where Romer L.J. said that "a company . . . . may undoubtedly by its articles

(1) [1900] 1 Ch. 656.

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"of association provide for a lien on the shares of its shareholders in respect of any debts for the time being due from "them to the company, and, if the original articles do not "provide for the lien, the company may subsequently, by "duly altering its articles, give itself such a lien." There is a statutory right to alter articles; and this right is not given up by implication. In substance in this case the company said to the respondent: "We appoint you as managing director for "ten years provided you remain a director for that period."

H. U. Willink K.C. and *John P. Ashworth* for the respondent. If the contract by which the respondent was appointed managing director for ten years—a contract which was within the competence of the appellants to make—could be abrogated in the way attempted, the situation would indeed be serious. The respondent was a director when he was appointed managing director, and that contract was not modified by the articles: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (1) In *Fowler* v. *Commercial Timber Co., Ld.* (2), the plaintiff was appointed managing director for five years at a salary. Before the expiration of the five years a resolution, which was supported by the plaintiff, was duly passed for the voluntary winding up of the company. It was held that a term could not be implied that if the company went into voluntary liquidation with the assent of the plaintiff he should lose all right to recover damages for the breach of the agreement. He was held entitled to damages for that breach. In the present case nothing can be more express than that the respondent should undertake the duties of managing director for ten years. The construction for which we contend is supported by the observations of Cockburn C.J. in *Stirling* v. *Maitland* (3), where he said: "If a party enters into an arrangement which "can only take effect by the continuance of a certain existing "state of circumstances, there is an implied engagement on "his part that he shall do nothing of his own motion to put "an end to that state of circumstances, under which alone the "arrangement can be operative." If Southern itself had

(1) (1888) 39 Ch. D. 339.
(2) [1930] 2 K. B. 1.
(3) (1864) 5 B. & S. 840, 852.

repudiated the contract it would clearly have been liable, and to do something which enabled a third party to produce the same result was as if Southern itself had done it. *Measures Brothers, Ld.* v. *Measures* (1) established this, that in the case of an express contract impossibility is no answer. Here the respondent had a contract for ten years with the implication that the rights thereunder would not be prejudiced by the appellants.

Valentine Holmes in reply. The respondent was subject to the same rules as to removal and resignation as the other directors. The passage quoted from the judgment of Cockburn C.J. is much too wide. Here the appellants have not contracted that a certain state of things would continue to exist.

The House took time for consideration.

1940. April 22. Viscount Maugham. My Lords, the facts in this case are not in dispute and may be stated as follows :—

The appellants (whom I shall call " Southern ") were incorporated in the year 1926 as a private company with the object of carrying on the business of ironfounders. The respondent became a director of Southern in the year 1929. The articles of association of Southern which regulated his position as such director included the following articles :—

" 84. Until otherwise determined by a general meeting, "the number of directors shall be not less than two nor more "than eight. Subject to the rights of the holders of any of "the debentures hereinafter mentioned for the time being "outstanding four directors shall be appointed by the "subscribers to the memorandum of association.

" 85. The qualification of a director shall be the holding "in his own right alone, and not jointly with any other person, "of not less than 200 ordinary shares of the company, and "such qualification shall be acquired within two months after "appointment as director.

" 89. Subject as herein otherwise provided or to the

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(1) [1910] 2 Ch. 248.

"terms of any subsisting agreement, the office of a director "shall be vacated:

" (*a*) If he becomes bankrupt or insolvent or compound "with his creditors.

" (*b*) If he become of unsound mind or be found a "lunatic.

" (*c*) If he be convicted of an indictable offence.

" (*d*) If he cease to hold the necessary qualification in "shares or stock, or does not obtain the same within two "months of the date of his appointment.

" (*e*) If he wilfully absent himself from the meetings of "the directors for a period of six consecutive calendar "months without special leave of absence from the other "directors and they pass a resolution that he has by reason "of such absence vacated his office.

"(*f*) If he gives the directors one month's notice in "writing that he resigns his office.

" 90. The directors may from time to time appoint any "one or more of their body to be managing director or "managing directors for such period and upon such terms as "they think fit, and may vest in such managing director or "managing directors such of the powers hereby vested in the "directors generally as they may think fit, and such powers "may be made exercisable for such period or periods, and "upon such conditions and subject to such restrictions and "generally upon such terms as to remuneration and otherwise "as they may determine. The remuneration of a managing "director may be by way of salary or commission or participa"tion in profits or by any or all of those modes.

"91. A managing director shall not while he continues to "hold that office be subject to retirement by rotation, and he "shall not be taken into account in determining the rotation of "retirement of directors, but he shall, subject to the provisions "of any contract between him and the company, be subject to "the same provisions as to resignation and removal as the other "directors of the company, and if he cease to hold the office of "director he shall ipso facto and immediately cease to be a "managing director.

"105. The company may by extraordinary resolution "remove any ordinary director before the expiration of his "period of office, and may, if thought fit, by ordinary resolution appoint another director in his stead; but any person "so appointed shall retain his office only until the next following "ordinary general meeting of the company, and shall then be "eligible for re-election."

On December 21, 1933, an agreement was entered into between Southern, the respondent, and Sir Berkeley Sheffield (who was at that time the holder of all the debentures and nearly the whole of the capital of Southern) whereby the respondent was appointed managing director of Southern for the term of ten years. The agreement contained, amongst others, the following clauses:—

"1. Mr. Shirlaw shall be and he is hereby appointed "managing director of the company and as such managing "director he shall perform the duties and exercise the powers "which from time to time may be assigned to or vested in him "by the directors of the company.

"2. Mr. Shirlaw shall hold the said office for the term of "ten years from the first day of December, 1933.

"3. Mr. Shirlaw shall, unless prevented from ill-health, "throughout the said term devote the whole of his time "attention and abilities to the business of the company (sub- "ject however to clause 10 hereof) and shall obey the orders "from time to time of the board of the company and in all "respects conform to and comply with the directions and "regulations made by such board and shall well and faithfully "serve the company and use his utmost endeavours to promote "the interests thereof.

"9. If before the expiration of this agreement the tenure of "office by Mr. Shirlaw shall be determined by the winding up "of the company (other than for the purpose of reconstruction "or amalgamation) Mr. Shirlaw shall have no claim against the "company or Sir Berkeley Sheffield for damages in respect of "such determination."

The agreement provided for payment of a salary to the respondent as managing director of 1700*l.*, rising by annual increments of 100*l.* to 2000*l.* a year, and of commission at the rate of five per cent. on the net profits of the company available for dividend in any year. The respondent bound himself not during the continuance of the agreement or within three years after its termination without the consent of the company to carry on or be engaged in the business of a foundry within one hundred miles of the company's works at Croydon. The agreement also contained provisions relating to the furnishing by Sir Berkeley Sheffield of finance for a company, Steel Parts, Ld., in which the respondent was interested.

Clause 10 (referred to in clause 3 supra) provided that the respondent might hold a directorship in Steel Parts, Ld., and devote a specified part of his time to that company.

In the year 1935 it was agreed by Southern and some ten other companies engaged in similar businesses to effect what was called an " Ironfounders' Merger," and with that object in view the appellants, Federated Foundries, Ld. (which I shall call " Federated "), were incorporated on December 6, 1935.

The amalgamation was carried through by transfers of all the shares in the capital of the associated companies to the Federated or its nominees on the terms of the accountants' report.

The holders of the shares so transferred were to receive and did receive in exchange allotments of preference and ordinary shares in Federated credited as fully paid. Part of the arrangement for amalgamation was that the associated companies would adopt new articles of association in similar terms. This was done at extraordinary general meetings of the companies, the resolution in the case of Southern being passed on April 17, 1936. The matter had been completed by April 23, 1936, except that certain transfers of shares had to be executed in relation to qualification shares in the associated companies; and, in order to provide the associated companies with one shareholder in addition to the Federated, one share in each of those Companies had to be transferred to a nominee of Federated. When all these things had been done the position was that Federated owned beneficially every share in each of the associated companies and was in complete control of those companies, and each of them had adopted new articles of association in order to make such control effective to the same extent in relation to each of those companies. The new articles were very different in many respects from the previous articles of the associated companies, including those of Southern. Table A of the First Schedule to the Companies Act, 1929, so far as not excluded or altered was to apply ; but the articles as regards the directors were almost entirely new. The following seem to be of some importance, and it is art. 8 which has led to this litigation :—

"7. The number of the directors shall be not less than "two or more than ten.

"8. Subject to the immediately preceding article, "Federated Foundries, Ld., shall have power at any time "and from time to time by an instrument in writing subscribed "on its behalf by two of its directors and its secretary to "appoint any person to be a director of the company and to "remove from office any director of the company. Every "such instrument shall be deposited at the registered office of "the company and shall take effect as at the time of such "deposit."

Art. 68 of Table A in the Companies Act, 1929, was incorporated in the articles. It is as follows :—

"68. The directors may from time to time appoint one or "more of their body to the office of managing director or "manager for such term and at such remuneration (whether by "way of salary, or commission, or participation in profits, or "partly in one way and partly in another) as they may think "fit, and a director so appointed shall not, while holding that "office, be subject to retirement by rotation, or taken into "account in determining the rotation or retirement of "directors ; but his appointment shall be subject to determina"tion ipso facto if he ceases from any cause to be a director, "or if the company in general meeting resolve that his tenure "of the office of managing director or manager be determined."

Art. 72 of Table A which provides that the office of director shall be vacated in a number of events, including bankruptcy, lunacy, and resignation in writing, was not incorporated; and apparently the only way of terminating the appointment is under art. 8.

The new article clearly put it in the power of Federated to remove the respondent from his office as a director whenever it seemed to Federated desirable so to do. Directors of the other companies were in the same position. There is no suggestion, however, that this article was aimed in any way at the respondent, or that it was unreasonable from the point of view of an amalgamation of the interests of the eleven companies. Nor is it pleaded in the action that the adoption of the articles was a breach of the contract of December 21, 1933, and counsel for the respondent disclaimed at the Bar any intention to set up such an argument. It must therefore be accepted that the articles of Southern were lawfully and properly changed without a breach of the contract with the respondent.

There is no reason to think that the events which followed and led to this action were anticipated by any of the parties. Negotiations took place in November, 1936, and subsequently between Federated and the managing directors of the associated companies including, of course, the respondent, with a view to the adoption of fresh agreements with all the managing directors. The respondent declined to accept the new agreement proposed to be entered into between himself and Southern, the terms of which were less favourable to him than those of the existing agreement. After various efforts to settle the dispute, the directors of Federated on March 25, 1937, came to the conclusion that an exception could not be allowed in the respondent's case from the principle that the managing directors of all the associated companies should accept the new agreements offered by Federated in lieu of their current agreements (as all the other managing directors had done), and a resolution was passed that the respondent be removed forthwith from the board of Southern. On March 25, 1937, an instrument in writing removing the respondent from his office as a director of Southern was signed on behalf of Federated by two directors and the secretary, and was delivered to Southern and deposited at the registered office of Southern on March 27, 1937. The respondent thereupon ceased to be a director of Southern, and, as is admitted, necessarily ceased at the same time to be the managing director of Southern.

The respondent issued his writ on June 10, 1937, against Southern and Federated. The statement of claim (para. 4) alleges that Federated wrongfully resolved to remove the plaintiff from his directorship of Southern and purported to do so by the instrument in writing of March 25, 1937. Para. 5 alleges that Southern adopted and accepted the said removal and thereby wrongfully repudiated the agreement of December 21, 1933, or, alternatively, have treated the plaintiff's appointment as managing director as terminated and have refused to allow him to perform his duties as managing director. There is no other breach of contract alleged. The claim against Federated (para. 6) is that that defendant wrongfully caused and induced Southern to be guilty of " the aforesaid breaches of the said agreement." It was agreed in the Court of Appeal and before your Lordships that if the claims against Southern were well founded, Federated was also liable for the reason alleged. I need not therefore say anything further on this part of the case.

The trial judge (Humphreys J.) decided in favour of the respondent and gave judgment in his favour for 12,000*l.* and costs. In the Court of Appeal (MacKinnon and Goddard L.JJ., the Master of the Rolls dissenting) affirmed Humphreys J.

My Lords, I think this case, like many cases which involve written agreements between limited companies and their officers—agreements which are necessarily affected to some extent by the articles of association—is a difficult case. It is indisputable that the agreement of December, 1933, did not and could not appoint the respondent to be a director of Southern. He had already been appointed to be a director in the only possible way, namely, according to the articles, and it is plain, I think, that he would cease to be a director in any of the events specified by the articles. If some new terms as to his directorship were desired, the only course was to alter the articles. It is equally indisputable, as I think, that the respondent would cease to be managing director as soon as he ceased to be a director; and that, as the Master of the Rolls pointed out, the two positions, that of director and that of manager, involve different qualifications, duties and responsibilities. It is quite erroneous, in my opinion, to contend that there was anything in the provisions of art. 89 (above set forth) which did not apply to the respondent after the agreement, though on the other hand it is possible that there was an implied term in the agreement that he would not during the ten years give notice to resign his office and would be committing a breach of this implied agreement if he did.

There are, however, a number of difficult questions which do arise as to the agreement, and one or two of them require an answer. In my opinion, it is quite impossible having regard to art. 89 to treat the agreement as containing any sort of guarantee that the respondent should remain a managing director during the term of ten years. That suggestion has indeed been given up. It is, I think, equally impossible to agree to the argument which was pressed upon the Court of Appeal that it was an implied term that the respondent should not cease to hold the office of director "by any means within "the control of himself or the company." For myself I agree with nearly the whole of the judgment of the Master of the Rolls. The only doubt I have felt is in regard to the well known principle laid down by Cockburn C.J. in *Stirling* v. *Maitland* (1), where he said: "If a party enters into an "arrangement which can only take effect by the continuance "of a certain existing state of circumstances, there is an im- "plied engagement on his part that he shall do nothing of "his own motion to put an end to that state of circumstances, "under which alone the arrangement can be operative."

This, as the Master of the Rolls observed, is not a rigid rule; it is capable of qualifications in any particular case; and it is a rule the application of which depends on the true construction of the agreement. An excellent example of this is to be found in the decision of this House in *Rhodes* v. *Forwood* (2), where the rule, contrary to the decision of the Exchequer Chamber, was held to be inapplicable. On the whole, however, I have come to the conclusion in this case, reading the agreement in the light of the surrounding circumstances, that a negative stipulation such as that formulated by Cockburn C.J. may properly be implied; but in my opinion the words "of his "own motion" should be borne in mind, and the implication must be taken to extend only to direct acts and not to the indirect and unforeseen consequences which may follow from acts of the party which, on the face of them, do not necessarily or even probably alter "the state of circumstances under "which alone the arrangement can be operative." In my view it would be unwarrantable in this case to imply a term that the articles of Southern should not be altered, however essential it was in the interests of the company, merely because such an alteration might possibly at some future date lead to the termination of the respondent's position as a director. The right of a company under the Companies Act, 1929 (s. 10), to alter its articles is statutory. It is conferred in the widest terms, and is, I think, subject only to the implied qualification that it must be exercised in good faith for the benefit of the company: *Allen* v. *Gold Reefs of West Africa* (1); but the alteration may not excuse a breach of contract for which the company may be liable in damages: *Baily* v. *British Equitable Assurance Co.* (2)

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(1) 5 B. & S. 840, 852.

(2) (1876) 1 App. Cas. 256, 274.

The right to alter the articles being inherent, if it is desired by a contract to give an employee or a third person a right of action if there should be an alteration of the articles which causes damages to him, I think it is very desirable to express such a term in clear language. Such a prohibition cannot be implied without very strong reasons: see *Swabey* v. *Port Darwin Gold Mining Co.* (3); *In re Argus Life Assurance Co.* (4); *Baily* v. *British Equitable Assurance Co.* (2)

In my opinion it would have been a breach of the negative term properly understood for Southern to have removed the respondent under art. 105 from his position as director during the ten years; but I am also of opinion that it was not a breach of any implied term in the agreement for Southern to alter its articles as was done and to include in the altered articles the new art. 8. I may add that clause 9 of the agreement shows clearly that the exact words of the term suggested by Cockburn C.J. would not be applicable without some qualification, for that clause makes it clear that Southern could wind up and distribute its assets without committing a breach of the agreement, though that would involve the dismissal of the respondent.

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(1) [1900] 1 Ch. 656, 671.
(2) [1904] 1 Ch. 374, 385.
(3) (1889) 1 Meg. 385.
(4) (1888) 39 Ch. D. 571.

For the above reasons and those given by the Master of the Rolls I cannot agree with the view of MacKinnon L.J. that we can properly imply a term in the agreement that the company should not exercise *or create* any right to remove the respondent from his directorship, if that includes the possible results of an alteration of the articles. It seems to me that a winding-up resolution would be within these words. Nor can I agree with the opinion of Goddard L.J. that it was a breach of the agreement for Southern to put it within the power of some other person or company under new articles and under different circumstances to remove the respondent. After all, an implied term ought to be one which the parties must necessarily have intended at the date of the agreement, and I do not myself think that either of the parties can be taken to have been providing for a state of things which would result from the de facto amalgamation of interests which no one contemplated at the date of the agreement but which in fact took place.

My Lords, the question which remains is whether the act of Federated, under art. 8 of the articles of Southern, in removing the respondent from his office of director of that company by an instrument in writing signed by two directors and the secretary of Federated was a breach by Southern of its agreement with the respondent or a repudiation of that agreement. It was the act of Federated which had the effect of removing the respondent from his directorship. After the new articles had been adopted Southern was powerless to prevent that act. Southern indeed was completely controlled by Federated, who held beneficially every share in Southern as in all the other associated companies. With all respect to those who think otherwise, I cannot understand the suggestion that Federated were acting as agents or, which is the same thing, as mandatories, of Southern in that matter, since Southern had not and indeed never had any power or influence whatever over Federated. It held not a single share in Federated. It was Federated who held the shares in Southern. Nor was there any contractual relation between Federated and Southern which might have enabled Southern to object to the act of Federated under art. 8. I think I understand the doctrine of anticipatory breach, but it is not alleged to apply here. If, under an agreement between A and B, A can lawfully do an act (e.g. by a sale of property) which gives power to an independent third party, C, to do a number of things some one of which may injure B, I do not see that A can be sued for a breach of the agreement which he cannot prevent. I repeat that it is not alleged in the pleadings or at the Bar that the adoption of the new articles by Southern was a breach of the contract with the respondent or was done in bad faith as regards him. If A enters into a contract of service with B, and then gives power to C to discharge B, and C does so, contrary to the terms of the contract, A is plainly liable because C has acted with his authority and in that sense as his agent in breaking the contract. In the present case, however, the contract is between a limited company and a director, and it was an implied term of the contract that the company by altering its articles could give wide powers to a third party, including a power to dismiss the company's directors. B cannot complain if he is so dismissed by the third party, for it is, as I think, impossible for B to take up the position that he is bound under his contract by the new articles but can sue the company for breach of that contract based on things lawfully done under the new articles.

My Lords, in my opinion, it has not been established in this case that Southern has committed any breach of the agreement or has repudiated the agreement, and the action therefore fails.

The Master of the Rolls at the conclusion of his judgment expressed a view on the hypothesis which he did not accept, that a certain implied undertaking, which I think his colleagues were accepting, had been broken. I do not think he would have expressed himself as he did if the hypothesis had included a statement that the alteration of the articles and the insertion of art. 8 was not prohibited by any implied term in the agreement.

For the reasons stated I should be in favour of allowing this appeal; but if a majority of your Lordships are of a contrary opinion it must be dismissed.

Lord Atkin. My Lords, the question in this case is whether the appellant company have broken their contract with the respondent made in December, 1933, that he should hold the office of managing director for ten years. The breach alleged is that under the articles adopted by the company, after the agreement, the respondent was removed from the position of director of the company by the Federated Foundries, Ld. There can be no doubt that the office of managing director could only be held by a director, and that upon the holder of the office of managing director ceasing for any cause to be a director the office would be ipso facto vacated. Under the articles in existence at the date of the agreement, by art. 89 the office of a director could be vacated on the happening of six various events, bankruptcy, lunacy, etc., including the giving by the director of one month's notice to resign; while by art. 105 the company by extraordinary resolution could remove him from his office. I feel no doubt that the true construction of the agreement is that the company agreed to employ the respondent and the respondent agreed to serve the company as managing director for the period of ten years. It was by the constitution of the company a condition of holding such office that the holder should continue to be a director: and such continuance depended upon the terms of the articles regulating the office of director. It was not disputed, and I take it to be clear law, that the company's articles so regulating the office of director could be altered from time to time: and therefore the continuance in office of the managing director under the agreement depended upon the provisions of the articles from time to time. Thus the contract of employment for the term of ten years was dependent upon the managing director continuing to be a director. This continuance of the directorship was a concurrent condition. The arrangement between the parties appears to me to be exactly described by the words of Cockburn C.J. in *Stirling* v. *Maitland* (1): "If a party "enters into an arrangement which can only take effect by the "continuance of an existing state of circumstances"; and in such a state of things the Lord Chief Justice said: "I look on the "law to be that .... there is an implied engagement on his part "that he shall do nothing of his own motion to put an end to "that state of circumstances, under which alone the arrange"ment can be operative." That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B. I think it follows that if either the company of its own motion removed the respondent from the office of director under art. 105, or if the respondent caused his office of director to be vacated by giving one month's notice of resignation under art. 89, either of them would have committed a breach of the agreement in question. As Kennedy L.J. said in *Measures Bros., Ld.* v. *Measures* (2) in discussing this very question of the effect upon a contract of employment as managing director of the managing director resigning his office of director: "It is elementary justice "that one of the parties to a contract shall not get rid of his "responsibilities thereunder by disabling the other contractor "from fulfilling his part of the bargain." I cannot agree with the view of the contract taken by the Master of the Rolls that the parties must be taken to have agreed that the term, though expressed to be for ten years, was subject to be determined by any cause, including the will of either party expressed in

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(1) 5 B. & S. 840, 852.

(2) [1910] 2 Ch. 248, 258.

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accordance with the articles; and that such determination therefore could not constitute a breach. I should have construed the agreement as I do on the first two clauses alone, but the remaining clauses and particularly those dealing with the mutual obligations between the respondent and Sir Berkeley Sheffield in this tripartite agreement in my view strongly reinforce that construction. I agree, therefore, with the trial judge, with the majority of the Court of Appeal, and with I believe all your Lordships in thinking that if during the term the respondent had given a notice of resignation, or if the company had exercised its power of removal under art. 105, either would have committed a breach of the contract.

The question that remains is whether if the removal by the company would have been a breach by the company, the removal under the altered articles by the Federated Foundries, Ld., was a breach by the company. In this matter the Master of the Rolls agreed with the other members of the Court of Appeal; but all the members of this House are not agreed. My Lords, it is obvious that the question is not as simple as in the case just considered of the removal being by the Southern Foundries, Ld.; but I venture respectfully to think that the result must be the same. The office of director involves contractual arrangements between the director and the company. If the company removes the director it puts an end to the contract: and indeed the contract relations cannot be determined unless by events stipulated for in the contract, by operation of law, or by the will of the two parties. The altered art. 8 which gives power to the Federated Foundries, Ld., to remove from office any director of the company is, when analysed, a power to the Federated to terminate a contract between the Southern and its director. It is an act which binds the Southern as against its promisee; and if a wrong to the respondent if done by the Southern it surely must be a wrong to the respondent if done by the Federated who derive their power to do the act from the Southern only. If a landlord gives power to a tenant to discharge the landlord's servants, gardener or gamekeeper; it is the master, the landlord, who is bound by the consequences of that discharge whether rightful, or whether wrongful, and so involving the payment of damages. If a man buys goods and contracts with a sub-purchaser to take delivery direct from his vendor, and contracts with his vendor to give delivery to the sub-purchasers, the latter's recourse for breach of contract to deliver is against his own intermediate seller and not against the head vendor. If then the Federated of their own motion determine the concurrent condition it appears to me that necessarily they cause the Southern to break the contract. I can quite see that the position may be altered where the Federated remove a director from office for such reasons as those contained in the old art. 89 or in art. 72 of Table A, which was not incorporated in the new articles. In such a case it may well be said that the company is not acting of its own motion, but is reasonably moved to act by the acts or omissions of the director. But in the present case no such question arises. The action of the Federated was, I think I may say avowedly, taken for the sole purpose of bringing the managing director's agreement to an end. I do not think that it could be said that the Southern committed any breach by adopting the new articles. But when the Federated acted upon the power conferred upon them in the new articles they bound the Southern if they acted in such a way that action by the Southern on the same articles would be a breach. It is not a question of agency but of acting under powers conferred by contract to interfere with a contract between the party granting the power and a third person. For these reasons I am of opinion that this appeal should be dismissed with costs.

LORD WRIGHT. My Lords, the respondent in this action is claiming damages from the appellants for breach by them of their contract to employ him as managing director for ten years.

The respondent has been held entitled to succeed in his claim for damages by Humphreys J. and in the Court of Appeal by MacKinnon and Goddard L.JJ., the Master of the Rolls dissenting. The only claim considered in this House has been that against the appellant company. A claim against the second company for procuring a breach of contract has wisely been withdrawn.

The agreement founded upon which was under seal dated December 21, 1933, was made between the appellant company and the respondent and Sir Berkeley Sheffield. The provisions directly material to this appeal are those between the appellant company and the respondent. Clauses 1 and 2 must be quoted in full.

"1. Mr. Shirlaw shall be and he is hereby appointed "managing director of the company and as such managing "director he shall perform the duties and exercise the powers "which from time to time may be assigned to or vested in "him by the directors of the company.

"2. Mr. Shirlaw shall hold the said office for the term of "10 years from December 1, 1933."

Then followed clauses providing for his faithful discharge of his obligations. He was to be paid a commencing salary of 1700*l.* per annum, rising by annual instalments to 2000*l.* and further a commission on net profits. Clauses 8 and 9 were as follows :—

"8. If Mr. Shirlaw shall fail for six consecutive months to "fulfil his obligations to the company hereunder the company "may by notice in writing determine this agreement.

"9. If before the expiration of this agreement the tenure of "office by Mr. Shirlaw shall be determined by the winding-up "of the company (other than for the purpose of reconstruction "or amalgamation) Mr. Shirlaw shall have no claim against "the company or Sir Berkeley Sheffield for damages in respect "of such determination."

There were other clauses not directly material. The respondent agreed to be subject to stringent restrictive covenants for three years after the termination of the agreement. Sir Berkeley Sheffield, who was a director of the appellant company, agreed to pay the respondent his living expenses in London for a period and the cost of removing himself and his family from Birmingham to London.

This agreement is unqualified in regard to the term of ten years save in the two events in which the appellant company was to be entitled to determine the agreement before the expiration of the term. But apart from the express language, the period of ten years is also qualified by the general rules of the law of employer and employed. Thus, the agreement would end if the respondent were to die, or become permanently incapacitated, and the appellant company would presumably have a right to dismiss him on the ground of misconduct as, for instance, embezzlement or disgraceful conduct leading to conviction for an indictable offence. These and similar matters would not specifically fall within clause 8. The employment has a double aspect. The respondent is both manager and director. It is clear merely ex vi termini that the respondent could not cease to be director, without ceasing to be managing director. The directorship is an integral and necessary element in the composite office. Hence if the appellant company were to remove him from his directorship during the term, save for some legal excuse, they would necessarily break their agreement to employ him for ten years as managing director. To do so would be a breach of their express promise and not of any implied term. The articles of association are not referred to in the agreement, but the respondent's claim in this case would not be prejudicially affected by anything in the articles of association as they existed at the date of the agreement. Art. 90 gave the directors power to appoint out of their body a managing director or directors for such period and upon such terms and with such powers as they should think fit. Art. 91 provided that a managing director should not while in the office be subject to retirement by rotation "but he shall subject to the pro-"visions of any contract between him and the company be "subject to the same provisions as to resignation and removal "as the other directors of the company and if he ceases to "hold the office of director he shall ipso facto and immediately "cease to be a managing director." Art. 91 was thus expressly subject to the provisions of the agreement, so far as, or rather if, in any event, it should conflict with the provisions of the agreement, such as the ten years' term of engagement. It is also necessary to mention art. 89 which contained an enumeration of events upon any one of which the office of a director should be vacated, such as bankruptcy or insolvency, lunacy, conviction of indictable offence, and similar matters which do not affect this case. Head (f) calls for special notice. It provides that the office of a director is to be vacated " If he gives the directors one month's notice "in writing that he resigns his office." That provision is clearly excluded under art. 91 as being inconsistent with the agreement to serve for ten years under clauses 1, 2 and 3. The respondent could not without just cause rightfully give such a notice, that is, if he did so, he would break his agreement and be liable to a claim for damages. But as the agreement would not be specifically enforced against him, his resignation, though a breach of contract, would have the effect of vacating his directorship and hence his office as managing director. In the same way art. 105 which empowers the company by extraordinary resolution to remove any director is equally excluded in the case of a managing director by art. 91. If the company under art. 105 had passed an extraordinary resolution to remove the respondent during his term of ten years, he would no doubt have ceased to hold office, because a claim by him for specific performance or kindred relief would, I assume, fail, but the removal would have been a breach of the agreement, unless for good cause.

In the result then, the articles, if they were regarded as qualifying the express agreement, would not in any substantial respect affect it. In my opinion the appellant company would beyond question have been guilty of a breach of contract sounding in damages if without just cause they had removed him from his directorship and thus terminated his tenure of office, as was done in March, 1937, in the circumstances which will appear later. The case would have been simply a case of wrongful dismissal of a servant or employee. The servant or employee is in such a case effectively dismissed. His employment is terminated but the termination is wrongful, and the employer has to answer in damages. The employers here are the appellant company, but for this purpose they are like any other employers. The articles may give them the power to dismiss, but the power to dismiss is to be distinguished from the right to dismiss. I do not think that in this particular case the fact that the office includes that of a director, affects this conclusion. It is said that it is impossible to accept that a company would guarantee to a director a ten years' tenure of his office. But the answer is that they have actually done so, according to the terms of the contract, though subject to the express exceptions of the contract and to the general exceptions which the law reads into the contract. The word guarantee is inappropriate. No one, individual or company, can be compelled against his or their will, to employ a man, though, if the contract is broken, damages will have to be paid. When the respondent was appointed managing director for ten years, the contract necessarily meant that the appellant company would not without good cause remove him from his directorship during that period, because if they did so they would ipso facto terminate his employment. There is no question of implying a term that the appellant company would not remove the respondent from his directorship. He could not serve for the agreed term of ten years unless the appellant company continued him in his office. As Lord Blackburn said in *Mackay* v. *Dick* (1): "where in a written contract it appears "that both parties have agreed that something shall be done" [as here that the respondent shall hold office for ten years] "which cannot effectually be done unless both concur in "doing it, the construction of the contract is that each agrees "to do all that is necessary to be done on his part for the "carrying out of that thing." The agreement involved for its fulfilment the concurrence of the appellants and the respondent and imported that each should do its part in carrying it out.

But the question in the case arises out of an alteration in the articles of association made in 1936, when the agreement had still about seven years to run. It had been decided to effect a combination of the operations of a number of companies engaged in the iron foundry trade, including the appellant company. A new company was incorporated named Federated

(1) (1881) 6 App. Cas. 251, 263.

Foundries, Ld., with that object, and it acquired the whole share capital of these companies. The respondent took part in these transactions and became one of the first directors of Federated Foundries, Ld., and was present at a meeting of the board of that company which unanimously resolved that each of the amalgamated companies should adopt similar articles of association. On April 17, 1936, at an extraordinary general meeting of the appellant company, at which the respondent was present, it was unanimously resolved by a special resolution that the existing articles of association should be abrogated and new articles decided upon by the Federated company should be adopted. It is not suggested that the action of the respondent as a director or shareholder had any bearing on his contractual rights. Of these new articles, art. 8 is so material that it should be set out in extenso. "8. . . . . Federated Foundries, Limited, shall "have power at any time and from time to time by an instru-"ment in writing subscribed on its behalf by two of its directors "and its secretary to appoint any person to be a director of "the company" [sc. the appellant company] " and to remove "from office any director of the company. Every such "instrument shall be deposited at the registered office of "the company." Art. 68 made a managing director's appointment subject to determination if for any cause he should cease to be a director, and omitted the reservation of existing contracts. It likewise gave the company power to determine the tenure of a managing director's office.

Negotiations took place between the respondent and the appellant company in which it was sought to vary the terms of the respondent's appointment, but these failed. On March 27, 1937, the Federated Foundries company served on the appellant company a notice pursuant to the new art. 8, whereupon under that article his appointment as director terminated and consequently under art. 68 of Table A his appointment as managing director was also terminated. But the question is whether the appellants can claim that it was rightfully terminated and resist the judgment for damages made against them. Assuming that there was the power under the articles to terminate the appointment, I repeat that the power to dismiss and the right to dismiss are two different things. This is true both of companies and individuals in their capacity of employers. The appellant company, however, take a more subtle point. They say that the employment was in fact terminated but not by them or by their responsibility, but by an outside person, Federated Foundries, exercising the powers vested in that company by the appellant company when it altered its articles in 1936.

Before dealing with this submission, it will be convenient to refer shortly to certain authorities. In *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1) the question arose whether the managing director who had been rightfully dismissed was entitled to be paid his salary quarterly or yearly. The articles provided that salaries were to be paid quarterly. Cotton L.J. said (2): " What we have to consider is not whether, as a "shareholder, he could have insisted on their performing that "agreement, but whether, under the contract . . . . he had that "right." It was held that the contract prevailed. The converse case is illustrated by *Allen* v. *Gold Reefs of West Africa* (3), where it was held that a company, by altering its articles under which there was no lien on fully paid shares so that the altered articles did impose such a lien, could enforce that lien against a shareholder indebted to the company. The members' rights depended on the articles, which were altered in good faith by the company under its statutory powers. But Lindley M.R. (4) observed: " It does "not . . . . follow that the altered article may not be inapplicable "to some particular fully paid up shareholder. He may have "special rights against the company, which do not invalidate "the resolution to alter the articles, but which may exempt "him from the operation of the articles, as altered." Later (5), he considers the case of a special contract made with a company in the terms of or embodying one or more of the articles, and adds that this may raise the question whether in such a case an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. He points out that "a company cannot break its contracts by "altering its articles." The Master of the Rolls is emphasizing the distinction between power or capacity and right. Romer L.J. (1) said that the shares became bound by the company's alteration of its articles unless he [the shareholder] could show some special bargain with the company or some special obligation incurred towards him by the company in respect of his fully paid up shares. This he failed to do. The alteration must, of course, be made in good faith.

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(1) 39 Ch. D. 339.
(2) Ibid. 359.
(3) [1900] 1 Ch. 656.
(4) [1900] 1 Ch. 656, 672.
(5) Ibid. 673.

In *Baily* v. *British Equitable Assurance Co.* (2) the question did not relate to articles of association but to by-laws of the insurance company. The Court of Appeal treated the by-laws as comparable to articles of association and the question as being whether the alteration of the by-laws which prejudiced the rights of policy holders as regards sharing in profits, was effective against them under the principles laid down in *Allen's* case. (3) Cozens Hardy L.J. in delivering the opinion of the Court, said (4) : " It would be dangerous to hold that "in a contract of loan or a contract of service . . . . there is any "greater power of variation of the rights and liabilities of the "parties than would exist if, instead of the company, the "contracting party had been an individual. A company "cannot, by altering its articles, justify a breach of contract." This expression of opinion with which I agree is very pertinent to this case. That case went to this House which reversed the decision of the Court of Appeal on the ground that no special contract existed, *British Equitable Assurance Co.* v. *Baily* (5), but did not question the principle stated by the Court of Appeal.

In *Nelson* v. *James Nelson & Sons, Ld.* (6), the plaintiff was appointed managing director of the defendant company under an agreement which provided that he was to hold the office so long as he should remain a director of the company and should perform his duties efficiently. The appointment was made under articles of association which empowered the directors to appoint the managing director for such period as they deemed fit, " and might revoke the appointment." The Court of Appeal held that the directors' power was in effect to appoint for a fixed time, and that this power was inconsistent with a power in the board to revoke the appointment at any time. As Swinfen Eady L.J. said (1): " the "power to appoint and the power to revoke the appointment "are in the board, but the power to revoke is to be subject "to the terms of the contract for the time being between the "managing director and the company." Hence when the directors dismissed the plaintiff without just cause, while still fulfilling the conditions of his contract, he was held entitled to recover damages for wrongful dismissal against the company.

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(1) [1900] 1 Ch. 680.
(2) [1904] 1 Ch. 374.
(3) [1900] 1 Ch. 656.
(4) [1904] 1 Ch. 385.
(5) [1906] A. C. 35.
(6) [1914] 2 K. B. 770.

It follows, I think, in the present case that if the appellant company had dismissed the respondent either under art. 105 of the original articles or art. 8 of the altered articles (assuming for the moment that the power to remove was vested in them), they would have committed a breach of their contract, there not being any just cause for dismissal. The special bargain would over-ride the article. The article must either be construed as not applying to the respondent, or as qualified by and subject to the express contract.

But the appellant company rely on the further point to which I have referred which is that altered art. 8 vests in Federated Foundries the right to remove a director, by means of a written instrument deposited at the appellant company's office. The article has been validly passed by the appellant company. Under that article, it is claimed, the respondent has been removed from his directorship. He has not been removed, it is said, from his office of managing director though that consequence follows inevitably. In that removal the appellant company say they have no part or lot and no responsibility. It is the act of an independent person, but all the same is effective to terminate the employment. If it is a wrongful termination, the appellant company are not liable for it and hence are entitled to succeed in this appeal. Such is the argument.

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(1) [1914] 2 K. B. 781.

The appellant company's case on this point found favour with no member of the Court of Appeal. It depends purely on a question of the law of contract. For the reasons already explained I do not consider that questions of company law, for instance those relating to the original or altered articles, materially affect the question. They go to questions of powers as between the two companies, whereas the question is as to right to dismiss. As I follow the appellant company's case, it is that a contract between A and B can, apart from any express or implied condition in the contract, be dissolved at the will of C, a stranger to the contract, without the consent of B, one of the contracting parties. It is contended that this is so because by an arrangement between A and C, A has vested this power in C. No authority is cited to justify such a proposition. A contract is a consensual agreement between A and B, between whom the rights and liabilities exist. I do not understand on what principle B can be ejected from his contractual rights, by the stranger C, with whom he has no privity. The appellants promised that the respondent should hold the office of managing director for ten years, subject to the express or implied conditions. The appellants now have to justify his removal while the contract period was running. No doubt there might be cases in which, apart from the contract provisions, the appellants could resist a claim for damages. There might for instance be a change in the law, or there might be a requisition by the Government of the works and undertaking of the appellant company which might in certain events frustrate and dissolve the contract irrespective of the will of the parties. But even in such cases it has been held that the requisition must not be self-induced, to use the phrase employed in *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (1) Even if the present case were, what it was not, analogous to such a case, the appellants could not say that the intervention of the Federated was not self-induced, since in fact if art. 8 had not been adopted in

(1) [1935] A. C. 524.

place of the earlier articles, Federated would have had no power to intervene. But it is clear that such intervention has no analogy to a requisition by Government or any change by operation of law. It follows from a private arrangement between the appellants and Federated, which is res inter alios acta so far as concerns the respondent's contractual rights, even if in fact it terminates his directorship and managing directorship. Apart from Government interference or the like, the contract can only rightfully be dissolved by the will of the parties who entered into it. That will may be evinced by the conditions, express or implied, which were originally agreed to, and by action in accordance with them, or by a subsequent agreement to rescind the contract. But nothing of the sort can be shown by the appellants. They have to justify the determination of the contract, or the case will be one of breach or repudiation. If their only justification is the action of Federated Foundries, that in my opinion is no defence. The alteration of the articles did not constitute a breach of contract by the appellant company as against the respondent, but his removal the following year did, and entitled him to damages.

In my opinion the appellant company fail in their defence and the appeal should be dismissed.

LORD ROMER. My Lords, the question to be determined upon this appeal is whether the appellants Southern Foundries (1926), Ld., to whom I shall hereafter refer as Southern, have committed a breach of any of the obligations, express or implied, imposed upon them by their contract with the respondent of December 21, 1933. If they have not, the respondent has no cause of action against either Southern or their co-appellants, Federated Foundries, Ld., and this appeal must necessarily succeed.

That there has been no breach by Southern of any express provision of this agreement is in my judgment quite plain. It is true that the respondent was appointed managing director of Southern for ten years from December 1, 1933, and that Southern ceased so to employ him on March 27, 1937. But that was because on this latter date he ceased to be a director of Southern. His appointment as managing director for ten years was necessarily subject to the implied qualification "if he shall so long remain a director"; because, as was pointed out by the Master of the Rolls, a managing director who is not a director is a contradiction in terms; and also because of the concluding words of art. 91 of Southern's original articles of association. If, therefore, any one of the events specified in art. 89 of Southern's original articles of association had occurred or Southern had removed the respondent from the board under the power conferred upon it by art. 105, the appointment of the respondent as managing director would have come to an end in accordance with the terms of his employment. And even if his directorship had been terminated by the action of Southern themselves there would have been no breach by them of any express provision contained in the agreement. Nor would there have been any breach by the respondent of any express obligation on his part contained in the agreement had his directorship been brought to an end by his resignation under art. 89 (f).

But the agreement by Southern to employ the respondent, or his agreement to serve them, could only take effect for the full ten years, if the respondent continued to be a director during that period. In these circumstances there was in my opinion an implied engagement on the part of Southern that they would not during that period exercise their power of removing him from his directorship under art. 105, and an implied obligation on his part that he would not during that period serve notice of resignation under art. 89 (f). "If," said Cockburn C.J. in *Stirling* v. *Maitland* (1), "a party "enters into an arrangement which can only take effect by "the continuance of a certain existing state of circumstances, "there is an implied engagement on his part that he shall do "nothing of his own motion to put an end to that state of "circumstances, under which alone the arrangement can be "operative." The principle so enunciated does not, however, warrant the implication in the present case of any further obligations on the part of Southern and the respondent than those I have mentioned. For the principle is one that is founded upon good reason and good sense, and is therefore to be applied in any particular case only so far as in the circumstances of the case good reason and good sense may require. It would be impossible, for instance, to suppose that the respondent committed a breach of an implied obligation under the agreement if he were to compound with his creditors or be convicted of an indictable offence. It would be equally impossible to suppose that Southern committed a breach of any implied obligations if the respondent were made bankrupt on their petition, or if, before para. (d) of art. 89 was deleted in January, 1936, Southern had enforced by sale any lien they might have held on the respondent's qualification shares. In my opinion the only obligation on the part of Southern that the principle requires to be implied is an obligation to abstain from any act of which the direct object is to bring the respondent's directorship to an end and not an obligation to abstain from every act of which the cessation of the respondent's directorship may be the indirect and unintended consequence.

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(1) 5 B. & S. 840, 852.

My Lords, for these reasons I am of opinion that when Southern exercised their statutory right of altering their articles of association they committed no breach of any implied obligation that they were under towards the respondent, even though one of the indirect and unintended consequences of the alteration was that the respondent was removed from his directorship. That his removal was both an indirect and unintended consequence of the alteration is plain. In view of what has been called, though incorrectly called, the merger of the Southern and the other nine companies, it was obviously convenient and in the best interests of Southern that all ten companies should have identical articles of association. There was therefore nothing sinister about the adoption by Southern of the new articles. No one can suggest, or indeed ever has suggested, that the adoption was made for the purpose of having the respondent removed, or that the possibility of such removal resulting from the adoption was ever in the contemplation of Southern. He was in fact removed, as we know, by the exercise by the appellants Federated Foundries, Ld. (hereinafter referred to as Foundries), of the general power over the directors of Southern conferred upon them by art. 8 of the new articles of association. But the conferring of this power on Foundries was no breach of any obligation they owed the respondent as I have already pointed out; and I am wholly unable to see how it could become a breach by any subsequent exercise of the power by Foundries. Had Southern in any way instigated the subsequent exercise of the power by Foundries their instigation could no doubt have been regarded as a breach of their implied obligation. But of any such instigation no trace is to be found. The removal of the respondent would appear to have been the spontaneous act of Foundries in the exercise of their free and unfettered discretion. Nor can Foundries be regarded as being in any way the agents of Southern in effecting the respondent's removal. It must be remembered in this connection that in the new articles of association art. 72 of Table A was not incorporated. There was, therefore, no article corresponding to art. 89 in the original articles. The result of this was that no director of Southern would vacate his office on the occurrence of any of the events specified in art. 89, and this no doubt was the reason for conferring upon Foundries, as being the beneficial owners of all the shares in Southern, the general power of removal of the Southern directors. Should one of them for instance become bankrupt, or of unsound mind, or be convicted of an indictable offence he would nevertheless continue to be a director unless and until Foundries chose to remove him. Had one of these calamities befallen the respondent and Foundries had removed him from his directorship, could it be said that Southern had committed a breach of their implied obligation? Plainly not. But this being so, the alleged breach of contract on their part is reduced to this, namely, that they omitted to insert in the new articles a provision that until December 1, 1943, Foundries should not remove the respondent from his directorship for any reason other than those specified in paras. (a), (b), (c), (e) and (f) of the old art. 89, and that this breach of contract on their part resulted in the respondent being damaged when Foundries removed him in March, 1937.

I have already given my reasons for thinking that Southern were under no implied obligation to make any such provision in the new articles. Their only implied obligation so far as I can see was not to remove him themselves except for one of the reasons specified in the old art. 89. The fact that when they adopted the new articles of association they took a step which indirectly and without any intention on their part made it possible for Foundries to remove him seems to me beside the mark. If a landowner agrees that he will himself do nothing on his land that may interfere with the light coming to the windows of his neighbour's house, he does not commit any breach of that agreement by selling his land to a third party who subsequently interferes with the light. Such interference would be merely an indirect and unintended result of the sale.

For these reasons I would allow the appeal.

LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of Humphreys J. by a majority.

The action out of which the appeal arises was brought by the respondent against the appellants who are two companies incorporated under the Companies Acts. The first appellants were incorporated in the year 1926 as a private company with the object of carrying on the business of iron founders. The second appellants were incorporated in December, 1935, with the object of bringing about the combination of eleven companies engaged in the foundry business of whom the Southern was one. The desired result was attained through the acquisition by the Federated company of a controlling interest in the share capital of each of the eleven companies.

The respondent became a director of the Southern company in the year 1929. At that moment one, Sir Berkeley Sheffield, was the holder of substantially the whole of the shares of the Southern company, and an agreement was entered into between him, the Southern company and the respondent under which the respondent was appointed managing director of the Southern company for the term of ten years from December 1, 1933. At the date of this appointment the articles of association of the Southern company authorized the appointment of a managing director in the following terms :—

"MANAGING DIRECTORS.

"90. The directors may from time to time appoint any one "or more of their body to be managing director or managing "directors, for such period and upon such terms as they "think fit, and may vest in such managing director or managing "directors such of the powers hereby vested in the directors "generally as they may think fit, and such powers may be "made exercisable for such period or periods, and upon such "conditions and subject to such restrictions and generally "upon such terms as to remuneration and otherwise as they "may determine. The remuneration of a managing director "may be by way of salary or commission or participation in "profits, or by any or all of those modes.

"91. A managing director shall not while he continues to "hold that office be subject to retirement by rotation, and he "shall not be taken into account in determining the rotation "of retirement of directors, but he shall, subject to the "provisions of any contract between him and the company, "be subject to the same provisions as to resignation and "removal as the other directors of the company, and if he cease "to hold the office of director he shall ipso facto and immediately "cease to be a managing director."

At the same time the provisions with regard to the vacation of the office of a director were contained in arts. 89, 98 and 105. The terms of these articles are as follows :—

"89. Subject as herein otherwise provided or to the terms "of any subsisting agreement, the office of a director shall be "vacated :

"(a) If he become bankrupt or insolvent or compound "with his creditors.

"(b) If he become of unsound mind or be found a lunatic.

"(c) If he be convicted of an indictable offence.

"(d) If he cease to hold the necessary qualification in "shares or stock, or does not obtain the same within two "months of the date of his appointment.

"(e) If he wilfully absent himself from the meetings of "the directors for a period of six consecutive calendar "months without special leave of absence from the other "directors and they pass a resolution that he has by reason "of such absence vacated his office.

"(f) If he gives the directors one month's notice in "writing that he resigns his office.

"But any act done in good faith by a director whose office "is vacated as aforesaid shall be valid unless prior to the "doing of such act written notice shall have been served upon "the directors or an entry shall have been made in the "directors' minute book, stating that such director has ceased "to be a director of the company.

"A director may hold any other office or place of profit "under the company (except that of auditor) in conjunction "with his office of director, and on such terms as to "remuneration and otherwise as the directors shall arrange."

"98. Subject to the provisions of these articles, one-third "of the directors for the time being (if any), or if their number "is not a multiple of three then the number nearest to but not "exceeding one-third, shall retire from office at the ordinary "general meeting in 1927 and in every subsequent year."

"105. The company may by extraordinary resolution "remove any ordinary director before the expiration of his "period of office, and may, if thought fit, by ordinary "resolution appoint another director in his stead; but any "person so appointed shall retain his office only until the next "following ordinary general meeting of the company, and "shall then be eligible for re-election."

After the Federated company was formed each of the eleven companies whose shares were acquired by it, adopted new articles of association in identical form. This action was taken by the Southern company at an extraordinary general meeting held on April 17, 1936, at which the existing articles were revoked and new articles were adopted. At that time the

Federated company had already acquired all the shares of the Southern company except one, which was held by the respondent, but only as nominee of the Federated company.

Arts. 7 and 8 of the new articles provided :—

"7. The number of the directors shall be not less than two "or more than ten.

"8. Subject to the immediately preceding article, Federated "Foundries, Limited, shall have power at any time and from "time to time by an instrument in writing subscribed on its "behalf by two of its directors and its secretary to appoint "any person to be a director of the company and to remove "from office any director of the company. Every such "instrument shall be deposited at the registered office of the "company and shall take effect as at the time of such deposit."

Art. 11 provided : " that the directors shall not have "power except with the prior sanction" of the Federated company

"(*b*) to appoint any person to be a managing director."

These articles also incorporated Table A with the omission of certain of the articles ; art. 68, dealing with the appointment of a managing director was retained and was in the following form :—

"68. The directors may from time to time appoint one or "more of their body to the office of managing director or "manager for such term and at such remuneration (whether "by way of salary, or commission, or participation in profits, "or partly in one way and partly in another) as they may "think fit, and a director so appointed shall not, while holding "that office, be subject to retirement by rotation or taken "into account in determining the rotation or retirement of "directors ; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a "director, or if the company in general meeting resolve that "his tenure of the office of managing director or manager be "determined."

But art. 72 dealing with the vacation of the office of director and arts. 73 to 80 dealing with the rotation and removal of directors were struck out.

On March 25, 1937, the board of directors of the Federated company passed a resolution removing the respondent from his office as a director of the Southern company and an instrument in writing subscribed on behalf of the Federated company by two of its directors and its secretary was sent to the office of the Southern company and was received by it on March 27, 1937.

Upon receipt of this document the respondent admittedly ceased to be a director of the Southern company and consequently ceased to be managing director. The respondent, however, contends that he was thereby wrongfully dismissed from his office as managing director by the Southern company and that that company is liable to him in damages for breach of the agreement of December 21, 1933. He also contends that the Federated company is liable to him in damages for procuring that breach. No question arises for the determination of your Lordships' House as to whether the latter claim is or is not sustainable, since the appellants were content to treat the result of the action against the Southern company as binding also upon the Federated company, and in the remarks which follow I deal only with the right of action of the respondent against the Southern company.

Humphreys J. before whom the action came in the first instance, decided in favour of the respondent, and in the Court of Appeal this decision was upheld by MacKinnon and Goddard L.JJ., the Master of the Rolls dissenting.

Before dealing with the more difficult question whether the removal of the respondent from his position as director either by the Southern or the Federated company constituted a breach of his contract of service as managing director, it is necessary to determine whether that contract was itself at the time at which it was made one for ten years certain or was only for such period as the Southern company chose to retain him as a director. The same question might perhaps be put in another way, namely, to what extent was the respondent subject to the terms of arts. 89, 98 and 105 of the original articles.

It is to be observed that the contract provides for his engagement for ten years without qualification, that art. 90 authorizes the appointment of a managing director for such period as the directors think fit, and that art. 91 provides that when so appointed, though he is not subject to art. 98, yet unless his contract otherwise provides he is subject to removal under art. 105, and authorized to resign under art. 89 (f). I think that your Lordships are agreed that the contract does, however, otherwise provide. Clause 2 states that the respondent shall hold the office for the term of ten years. Clause 3 provides that throughout the said term he shall devote the whole of his time to the business. Clause 4 fixes his salary at a rate which increases until the fourth year is reached. Clauses 8 and 9 provide, in the event of the winding up of the company, except for certain purposes, for the respondent's dismissal and right to damages in terms which are more consistent with a fixed tenure of ten years than a contract terminable at the will of the company or of the respondent. And clauses 11 and 12, which prohibit the setting up or joining a competing business and soliciting or dealing with customers of the Southern company, contain provisions which would be surprising in the case of a man whose office might rightfully be determined at any moment, more particularly as he is by clause 12 prohibited from dealing with or soliciting any person who has been a customer during three years before his appointment ends—a period which if the company could get rid of him at any time might long precede the beginning of the contract.

But apart from these considerations it has to be borne in mind that Sir Berkeley Sheffield was also a party to the contract and that he not only undertook by clause 13 to pay an extra sum for the respondent's living expenses and the cost of his removal to London up to twelve months after the date of the contract, but also entered into an arrangement with the respondent as to the subscription for and the non-transference of preference shares in another company so long as the obligations of the respondent under the contract were duly and punctually performed.

In my view, therefore, the terms of the contract lead to the conclusion that it is one for ten years and is not subject to the provisions of arts. 89 (f), 98 and 105.

Having regard to the provisions of arts. 90 and 91 it could not be and was not contended that such an appointment was ultra vires.

The application of the rest of the terms of art. 89 to a managing director is somewhat different. The true view may well be that in the case of the happening of any of the events foreshadowed in (a) to (d) the respondent would cease to be a director and therefore a managing director. The same is, I think, true in the case of 89 (e), but as a similar provision is contained in clause 3 of the contract its materiality is not great. In none of these events, however, would either party be liable to an action for breach of contract and this result follows whether one regards the contract as incorporating the articles save where its terms are inconsistent with them, or whether the termination of the directorship in such cases is regarded as not being due to the intervention of either party. However this may be, in my view, unless the articles were altered the company except in certain specified cases could not dismiss the respondent nor the respondent leave the company for ten years without being liable to be sued for breach of contract.

This was, in my view, the position when the contract was entered into. What then was the effect of the arrangement with the Federated company and the alteration of the articles ?

It is common ground and indeed long-established law that a company cannot forgo its right to alter its articles, but it does not follow that the alteration may not be or result in a breach of contract. The principle is perhaps most clearly enunciated in *Allen* v. *Gold Reefs of West Africa* (1), a case in which a company was held entitled to alter its articles so as to obtain a lien on fully paid shares, though before the alteration it had a lien only upon partially paid shares. But Lindley M.R. states the position in two passages (2) :

" A company cannot break its contracts by altering its "articles, but, when dealing with contracts referring to revocable "articles, and especially with contracts between a member of

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(1) [1900] 1 Ch. 656.

(2) Ibid. 673.

"the company and the company respecting his shares, care "must be taken not to assume that the contract involves as "one of its terms an article which is not to be altered"; and " It is easy to imagine cases in which even a member of a "company may acquire by contract or otherwise special "rights against the company which exclude him from the "operation of a subsequently altered article"; and in *Baily* v. *British Equitable Assurance Co.* (1) (reversed on another point (2)), in which a participating policy holder who had taken out a policy which the Court of Appeal thought entitled him to have the whole of the profits distributed, was held entitled to a declaration that the assurance company ought to distribute the whole of such profits. The action was necessitated because the company, which when the policy was taken out had been formed and was operating under a deed of settlement providing for the distribution of the whole of the profits, at a later date proposed to register itself with limited liability, to substitute a memorandum and articles for the deed of settlement and under the terms of the articles to carry part of the profits to a reserve fund.

The Court of Appeal affirmed a declaration by Kekewich J. that the company ought to continue to distribute the entire profits arising from the participating branch of its business, and Cozens Hardy L.J. said (3): " But the case of a contract "between an outsider and the company is entirely different, "and even a shareholder must be regarded as an outsider in "so far as he contracts with the company otherwise than in "respect of his shares. It would be dangerous to hold that in "a contract of . . . . service . . . . validly entered into by "a company there is any greater power of variation of the "rights and liabilities of the parties than would exist if, "instead of the company, the contracting party had been an "individual."

The general principle therefore may, I think, be thus stated. A company cannot be precluded from altering its articles thereby giving itself power to act upon the provisions

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(1) [1904] 1 Ch. 374.
(2) [1906] A. C. 35.
(3) [1904] 1 Ch. 385.

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of the altered articles—but so to act may nevertheless be a breach of contract if it is contrary to a stipulation in a contract validly made before the alteration.

Nor can an injunction be granted to prevent the adoption of the new articles and in that sense they are binding on all and sundry, but for the company to act upon them will none the less render it liable in damages if such action is contrary to the previous engagements of the company. If, therefore, the altered articles had provided for the dismissal without notice of a managing director previously appointed, the dismissal would be intra vires the company but would nevertheless expose the company to an action for damages if the appointment had been for a term of (say) ten years and he were dismissed in less.

Once it is established that the appointment is for a time certain and the dismissal before its termination, the result follows, and I do not understand the appellants to contend to the contrary. The complication lies in the fact firstly that the respondent has been dismissed not from his office of managing director but has been removed from his position of director, and secondly, that the removal has been effected not by the Southern but by the Federated company.

So far as the first matter is concerned the decision must, I think, be reached by applying the well known principle laid down by Cockburn C.J. in *Stirling* v. *Maitland* (1), which I quote in extenso: "I look on the law to be that, if a party "enters into an arrangement which can only take effect by "the continuance of a certain existing state of circumstances, "there is an implied engagement on his part that he shall "do nothing of his own motion to put an end to that state "of circumstances, under which alone the arrangement can "be operative. I agree that if the company had come to an "end by some independent circumstance, not created by the "defendants themselves, if might very well be that the "covenant would not have the effect contended for; but if it is "put an end to by their own voluntary act, that is a breach of "covenant for which the plaintiff may sue. The transfer of "business and dissolution of the company was certainly the

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(1) 5 B. & S. 840, 852.

"act of the company itself, so that they have by their act "put an end to the state of things under which alone this "covenant would operate."

If therefore the Southern company had altered their articles in such a way as to enable them to remove the respondent from his directorship at will, and had so removed him, I in common, I believe, with all your Lordships, would regard their action as coming under Sir Alexander Cockburn's dictum as an actionable breach of contract.

In reaching this conclusion I find myself unable to accept the dissenting judgment of the Master of the Rolls, who took the view that under the contract the plaintiff was not expressly appointed managing director for ten years but only for such a period not exceeding ten years as he remained a director and that no term could be implied which would prevent the company from terminating the respondent's directorship, with the result that he ceased to be capable of retaining his position as managing director.

But no such alteration was made—the new articles did away with all former grounds of removal and termination of the director's office and left it to the Federated company at their absolute discretion to keep or remove a director of the Southern company. That change, it is said, is no breach, or at any rate is not contended to be a breach of the respondent's contract, and his later removal is the act of the Federated and not of the Southern company, and one therefore for which the latter company is not responsible.

This contention was negatived by the Master of the Rolls as well as the other two members of the Court of Appeal. As, however, the main argument appears to have been grounded upon the question of the true construction of the contract, the matter now under consideration was treated as subsidiary, with the consequence that it is dealt with very shortly in the Court of Appeal.

I cannot say that I have found the solution an easy one and obviously having regard to the divergence of view in your Lordships' House the matter is one which lends itself to a conflict of opinion. Some support for the appellants' contention

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was sought in the case of *Bluett* v. *Stutchbury's, Ld.* (1) The case is very shortly reported and the exact grounds of the decision are not easy to ascertain, but they lend some countenance to the appellants' argument inasmuch as in that case, as in this, the articles had been altered so that the retention or dismissal of the director from his directorship was left to the determination of a third party. Cozens Hardy M.R. is reported to have said that in such circumstances if the third party deprived the managing director of his directorship he necessarily ceased to be managing director, the company could not prevent that action and were in no sense the authors of the dismissal.

If the true view be that the only action taken by the company was the alteration of the articles, and if indeed thereafter they were in no way implicated in the act of the Federated company in removing the respondent and could not help themselves, then the appeal must succeed. But though it is true that ultimately the Southern company could not prevent the Federated company from removing the respondent from his directorship, the act of removal is not, I think, solely the act of the Federated company. Rather it is the combined act of both, an act impossible to the latter but for the act of the former and not resulting in a breach of contract until the power of dismissal given by the former was acted upon by the latter. To say that the Southern company could have helped themselves if they removed the respondent from his directorship but could not do so where they authorized the removal by another would seem to me to treat what is at best a technicality as if it were the substance of the case. It is the Southern company's act which has resulted in the respondent's removal and none the less so though his dismissal required two acts and not one for its accomplishment.

I would affirm the judgment of the Court of Appeal.

Appeal dismissed.

Solicitors for appellants: *Allen & Overy.*
Solicitors for respondent: *Slaughter & May.*

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(1) (1908) 24 Times L. R. 469.

[PRIVY COUNCIL.]

J. C.* NICHOLAS . . . . APPELLANT;
1940
AND
April 25.
COMMISSIONER OF TAXES OF THE STATE OF VICTORIA . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Victoria)—Revenue—Company—Issue of bonus shares to shareholder—As fully paid—Out of accumulated undistributed profits of company—Value of shares to be included in income assessable to Special Tax and Unemployment Relief Tax—Income Tax Act, 1935 (*Vict.*, 26 *Geo.* 5, *No.* 4309), *s.* 2, *sub-s.* 1 (*g*) (*ii.*)—*Unemployment Relief Tax* (*Assessment*) *Act*, 1933 (*Vict.*, 24 *Geo.* 5, *No.* 4171), *s.* 4.

The appellant, ordinarily resident in Victoria, was a shareholder in a company incorporated in and carrying on business in Victoria, and pursuant to a resolution of the company in general meeting to distribute bonus shares out of a reserve account representing accumulated undistributed profits of the company, he had allotted to him, in proportion to his holding in the company, 210,000 shares, as fully paid, of the value of 210,000*l.* :—

Held, that a dividend, profit or bonus of 210,000*l.* was credited to the appellant from the profits of the company, and that that sum should be included in the assessment of his taxable income for the purposes of Special Tax and Unemployment Relief Tax under the Income Tax Act, 1935, and the Unemployment Relief Tax (Assessment) Act, 1933, respectively, both of which provided that " any dividend interest profit or bonus credited paid or " distributed to him by the company from any profit derived in " or from Victoria or elsewhere by it " should be deemed to form part of a person's assessable income.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171 distinguished.

James v. *Federal Commissioner of Taxation* (1924) 34 C. L. R. 404 referred to.

Judgment of the High Court of Australia (1938) 59 C. L. R. 230 affirmed.

APPEAL (No. 51 of 1939), by special leave, from a judgment of the High Court of Australia (March 25, 1938), reversing a judgment of the Full Court of the Supreme Court of Victoria (September 1, 1937) upon a special case stated by a judge of the County Court of Melbourne.

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT SANKEY, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

The appellant, George Richard Nicholas, at all material times ordinarily resident in Victoria, was the principal shareholder of Lorraine Investments Proprietary, Ld., a company incorporated in Victoria in 1926 under the Victorian Companies Acts, and carrying on business in Victoria. At August 29, 1934, the company, whose nominal capital was then 500,000*l.*, had issued 50,000 1*l.* shares, of which the appellant held 29,995, and trustees for four persons, also of the name of Nicholas, held 20,000, and five shares were held by one other person. On August 29, 1934, the company in general meeting resolved to distribute out of its Reserve Account bonus shares to the full amount—namely, 350,000*l.*, which stood to the credit of that account. It was found in the case stated that that sum of 350,000*l.* consisted of undistributed profits of the company earned from the carrying on of its business since its commencement. In pursuance of that resolution 210,000 shares of the company were issued to the appellant, and 140,000 of such shares to the abovementioned trustees. It was further found in the case that the 210,000 shares issued to the appellant were of the value of 210,000*l.*

The question arising in this appeal was whether that 210,000*l.* ought to be included in the assessment made upon the appellant for the year 1935–36 to Special Tax imposed in s. 2, sub-s. 1 (*g*), of the Income Tax Act, 1935, of Victoria (26 Geo. 5, No. 4309), and to Unemployment Relief Tax under s. 4 of the Unemployment Relief Tax (Assessment) Act, 1933, of Victoria (24 Geo. 5, No. 4171), on the ground that the issue of the bonus shares fell within the expression "any dividend "interest profit or bonus credited paid or distributed to him "by the company" contained in s. 2, sub-s. 1 (*g*) (ii.), of the Act of 1935, and in s. 4 (*a*) and (*b*) of the Act of 1933.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Victoria (Mann C.J. and Macfarlan J., Gavan Duffy J. dissenting) decided the point in favour of the appellant.

On appeal by the Commissioner of Taxes the High Court of Australia (Latham C.J., Rich, Starke and McTiernan JJ., Evatt J. dissenting) reversed the decision of the Supreme Court of Victoria. The appeal is reported at (1938) 59 C. L. R. 230.

The appellant now appealed.

1940. March 12, 13, 15, 18. *Sir William Jowitt K.C.* and *Heyworth Talbot* for the appellant. The question is, was the capitalization a "dividend, interest, profit or bonus" within the meaning of the Acts, and, if so, was it "credited, paid or "distributed"? The relevant language in the Acts is, it is submitted, ambiguous; the Legislature has left out words, which are in the Federal statute, which would have made the tax exigible. Both taxpayer and company are in Victoria, and in that State, until these special Acts were passed, dividends from companies were not liable to tax: Income Tax Act, Victoria, No. 3701 of 1928, Pt. IV. It is conceded that if appropriate words are used anything may be "deemed" to be income, and the question in this case is whether the words used are ambiguous and permit of two meanings, or are perfectly precise. [Reference was made to the Unemployment Relief Tax (Assessment) Act, 1933, s. 2, sub-s. 2; s. 3, sub-s. 1; ss. 4, 5, 6, sub-s. 1 (*a*); and the Income Tax Act, 1935, s. 1, sub-s. 2; s. 2, sub-s. 1 (*g*).] There is no reason why a company under the present circumstances should not do what they did by proceeding quite directly and simply resolving to capitalize its reserve fund and distribute bonus shares. No dividend, interest, profit or bonus was credited, paid or distributed to the appellant by the company within the meaning of the enactments either in the process of capitalizing profits and issuing bonus shares, or otherwise. [Reference was made to *In re Ezekiel Barton's Trust* (1); the Law Quarterly Review, vol. 34, p. 7; *Inland Revenue Commissioners* v. *Blott* (2); *Inland Revenue Commissioners* v. *Fisher's Executors* (3); *Hill* v. *Permanent Trustee Co. of New South Wales* (4); and *Commissioner of Income-Tax, Bengal* v.

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(1) (1868) L. R. 5 Eq. 238.

(2) [1921] 2 A. C. 171.

(3) [1926] A. C. 395, 400.

(4) [1930] A. C. 720.

Mercantile Bank of India, Ld. (1)] *Swan Brewery Co., Ld.* v. *The King* (2) is very similar to the present case; the judgment in that case says, first, that there was a distribution of an advantage, and, secondly, that there must have been a notional payment of a dividend. *Blott's* case (3), *Fisher's Executor's* case (4), and the *Mercantile Bank* case (1), and other cases have plainly indicated that the *Swan Brewery* case (2) must be regarded as being primarily decided upon the word "advantage." *Pool* v. *The Guardian Investment Trust Co.* (5) is an illustration of how a dividend which is beyond question dividend in the nature of income may be paid although it is paid not in money or money's worth, or credit, but by giving shares in another company. The Australian cases in point are: *Webb* v. *Federal Commissioner of Taxation* (6); *James* v. *Federal Commissioner of Taxation* (7) is important, because it is on the strength of that case that the majority in the High Court were against the appellant in the present case; it is submitted either that *James's* case (7) is distinguishable from the present one, or that it was wrongly decided. The vital distinction between *James's* case (7) and this is that here there is not to be found any case of a crediting to the shareholder. It is also contended that *James's* case (7) is inconsistent with *Blott's* case (3); the form that was adopted in the latter case would involve a crediting to the shareholder. Can a company legally use its own money to pay for its own shares? Whether or not that can lawfully be done, it is what the company here have done; they have not adopted the roundabout method. So far from *In re Speir. Holt* v. *Speir* (8) supporting the *James's* case (7), it is submitted that it has precisely the opposite effect. [Reference was also made to *Executor, Trustee and Agency Co. of South Australia, Ld.* v. *Deputy Federal Commissioner of Taxation* (9); the Law Quarterly Review, vol. 33, p. 297; and *Trevor* v.

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(1) [1936] A. C. 478.
(2) [1914] A. C. 231.
(3) [1921] 2 A. C. 171.
(4) [1926] A. C. 395.
(5) [1922] 1 K. B. 347, 359.
(6) (1922) 30 C. L. R. 450, 477.
(7) (1924) 34 C. L. R. 404.
(8) [1924] 1 Ch. 359.
(9) (1928) 41 C. L. R. 299.

Whitworth. (1)] If the appellant is taxed as though it were a dividend in kind, then an injustice is done to him, because he is being taxed on the full face value of the bonus shares, overlooking that on the other side there is some diminution in the value of the existing shares which he holds. The judgment of the majority of the High Court involves the proposition that the process of capitalizing profits by the issue of bonus shares necessarily requires that there shall have been a "crediting" of a "dividend" to a shareholder as a step in the process, and such a proposition is inconsistent with the reasoning and decision in *Blott's* case. (2) The words "credited, paid or distributed" contemplate a liberation of profits, and the effect of the resolutions in this case was not to liberate profits, but to impound them to increase the capital of the company.

Heyworth Talbot followed. The case for the respondent can be put in either of two ways. It can be said, on the one hand, that the new shares which were issued were themselves a bonus within the meaning of the Victorian Acts, because they represented money's worth, and they were distributed, and therefore the section is satisfied. The alternative would appear to be that it may be said that the transaction which led to the issue of the bonus shares necessarily involved, as a step in the process, a crediting of a dividend. The first of these alternatives was expressly dissented from by Rich J. It is submitted that in its association "bonus" must be construed to mean an income bonus, this being an income tax Act, and the word follows three words which relate to what are specifically income subjects: that is the natural construction. It must be conceded that the word "bonus" standing alone might well include bonus shares, but in this case it is submitted that it does not include such shares. If that be right, then the point is covered by what was said in *Blott's* case. (2) As regards the second point—that the Victorian Acts catch the operation of capitalizing bonus shares at an intermediate stage, at the stage when there is either an actual or a notional crediting to the shareholder of a

(1) (1887) 12 App. Cas. 409. (2) [1921] 2 A. C. 171.

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dividend—it is said by the respondent that here there must have been a crediting or a payment or a distribution of a dividend, interest, profit or bonus. The answer to that is that that must depend wholly on the proposition that the introduction of the word " credited " in the Victorian Acts takes it out of the scope of the decision in *Blott's* case. (1) It is submitted that the words " dividend, interest, profit or " bonus credited, paid or distributed " are not wider than " total income from all sources."

J. M. Tucker K.C. and *Reginald Hills* for the respondent. The argument for the appellant was founded almost entirely on *Blott's* case (1), and it was contended that in the United Kingdom, as in India, *Blott's* case (1) has been held to be decisive on the particular question now before the Board. The English and the Indian Income Tax Acts, however, are entirely different in structure from the Victorian Acts now in question. If the intention of the Victorian Acts was that dividends which were truly income, and only those dividends, were to be taxed in the hands of the shareholder, there was no need for the extra provision " shall be deemed to form "part of the assessable income." That is why *Blott's* case (1) is really no authority at all on the present case, and is not one which governs it. The Victorian Acts have cast a much wider net. The Legislature are careful to say that these things are " deemed " to form part of the assessable income, and by so saying the Legislature has recognized that perhaps they would not otherwise be so. It is submitted that the view which found favour with Gavan Duffy J. in the Supreme Court of Victoria is correct. The relevant sections of the Acts mean that notwithstanding that a bonus distribution of shares may be capital, yet they shall be " deemed " to be income. There has been, in ordinary every day language, a bonus distributed to the shareholders by the company. The second ground is that there has been a crediting of a profit to the shareholder in the course of this transaction. There may be both—a bonus distributed and a profit credited. It is quite wrong to talk of shares being credited; what is

(1) [1921] 2 A. C. 171.

meant is that some person is credited as having paid up the amount on the shares he held ; the person is credited, not the shares. Once that is realized some of the difficulties seem to disappear. Reliance is placed on the grounds of the judgment of the Chief Justice in the High Court. Rich J. states the question to be "whether this operation does not involve or "connote the crediting of a profit to the shareholder," and he sums up his answer thus : "If the shareholder obtains "shares, stock, debentures, bonds or any other negotiable or "transferable form of obligation of the company or interest "in its assets, and the consideration which otherwise must be "supplied by him consists in an appropriation by the company "of profits to that end, it would seem to me to be the very "thing meant by 'crediting' the profits." (1) [Reference was made to *Blott's* case (2) and to *Ooregum Gold Mining Company of India* v. *Roper*. (3)] Any money to pay for the shares must come from an outside source ; if that be so, the true analysis of the position is exactly that stated in the dissenting judgment of Lord Sumner in *Blott's* case. (2) The English Act is looking at what the taxpayer receives ; the Victorian Acts are looking at the process which results in the taxpayer receiving something, and if in the course of that process there is a crediting from profits, as, it is submitted, there is in this case, then tax is exigible under the Victorian Acts.

Reginald Hills followed, and referred to *Inland Revenue Commissioners* v. *Blott.* (2)

Sir William Jowitt K.C. replied.

April 25. The judgment of their Lordships was delivered by LORD THANKERTON. This appeal arises out of a special case stated by a judge of the County Court of Melbourne under the provisions of s. 66 of the Income Tax Act, 1928, of the State of Victoria (Vict., 19 Geo. 5, No. 3701), and the question is whether an amount of 210,000*l.* ought to be included in the assessment made upon the appellant for the year 1935-36 as part of his assessable income liable to unemployment relief tax and special tax, which are imposed respectively by the Unemployment Relief Tax (Assessment) Act, 1933, and the Income Tax Act, 1935, both being statutes of the State of Victoria. The determination of the question rests upon the proper construction of these two statutes. The appeal is by special leave from a judgment of the High Court of Australia, dated March 25, 1938, which reversed a judgment of the Full Court of the Supreme Court of the State of Victoria, dated September 1, 1937.

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(1) (1938) 59 C. L. R. 244.

(2) [1921] 2 A. C. 171.

(3) [1892] A. C. 125, 134.

The relevant provision of the Unemployment Relief Tax (Assessment) Act, 1933 (Vict., 24 Geo. 5, No. 4171), is as follows: "4. For the purposes of this Act—(*a*) in the case "of any person who is a member or shareholder of a company "registered in Victoria—any dividend interest profit or bonus "credited paid or distributed to him by the company from "any profit derived in or from Victoria or elsewhere by it; "or (*b*) in the case of any person ordinarily resident in Victoria "who is a member or shareholder of a company whether "registered in Victoria or not and whether carrying on business "in Victoria or not—any dividend interest profit or bonus "credited paid or distributed to him by the company—shall "be deemed to form part of the assessable income of that "person."

The relevant provision of the Income Tax Act, 1935 (Vict., 26 Geo. 5, No. 4309), is as follows—"2. (1.) . . . . (*g*) in the "case of any person (not being a company) whose taxable "income within the meaning of this paragraph exceeds One "hundred pounds, there shall be payable (and whether or "not in his case there is also payable the tax additional tax "and further additional tax or any of them chargeable under "the preceding provisions of this section) a special tax on the "whole of the said taxable income of such person as hereinafter "provided, that is to say:—" [here follows a scale of rates graduated according to the total amount of taxable income] "For the purposes of this paragraph (*g*) of this subsection— ". . . . (ii.) subject to the said paragraph (*g*), the taxable "income within the meaning hereof of taxpayers hereunder "shall be calculated and the amount of the special tax "aforesaid payable by each taxpayer hereunder shall be assessed "in like manner as the taxable income within the meaning "of the Income Tax Acts (not including the said paragraph) "of taxpayers is calculated under the said Acts and as the "amount of the tax payable under the said Acts is assessed, "and for the purposes of the said paragraph the provisions "of the said Acts as modified by the said paragraph shall "take effect—as if in calculating the exemptions provided for "in section twenty-one of the Principal Act paragraph (*e*) "of that section were omitted ; . . . . as if in the Principal "Act it were provided that—in the case of any person who is a "member or shareholder of a company registered in Victoria— "any dividend interest profit or bonus credited paid or "distributed to him by the company from any profit derived "in or from Victoria or elsewhere by it ; and in the case of "any person ordinarily resident in Victoria who is a member "or shareholder of a company whether registered in Victoria "or not and whether carrying on business in Victoria or not— "any dividend interest profit or bonus credited paid or "distributed to him by the company—is to be deemed to form "part of the assessable income of that person."

As regards the question in this appeal, neither party has suggested that there is any material distinction between the terms of the two Acts ; the words immediately under construction being " any dividend interest profit or bonus "credited paid or distributed to him by the company," and it is equally accepted that in the case of a person ordinarily resident in Victoria—as the appellant is—these words relate to an application of the profits of the company.

The material facts may be summarized as follows : The appellant is a shareholder of Lorraine Investments Proprietary, Ld., a company incorporated in Victoria in 1926 under the Victorian Companies Acts, and carrying on business in Victoria. At the time of its incorporation the company had a nominal share capital of 100,000*l.*, divided into 100,000 shares of 1*l.* each. On August 22, 1932, the nominal capital was increased to 500,000*l.* by the creation of 400,000 new shares of 1*l.* each. Prior to August 29, 1934, the company issued 50,000 of these shares, and the same had been paid for in cash, and, on the said date, the shares of the company were held as follows:—

	Shares.
George R. Nicholas (the appellant)	29,995
Trustees of Betty, Lindsay, Nola and Hilton Nicholas	20,000
F. J. Davey	5
	50,000

On August 22, 1932, the company in general meeting passed the following resolution: "Resolved to transfer 122,505*l*. "from Profit and Loss Appropriation Account ex profits "accumulated prior to 30th June, 1932."

On August 29, 1934, the company in general meeting passed the following resolution: "Resolved to transfer the amount "of 150,000*l*. to Reserve Account, and to distribute bonus "shares out of Reserve Account to the full amount to credit "of this account, viz. 350,000*l*."

On September 25, 1934, the Directors of the company passed the following resolution: "Resolved to allot the "following shares in furtherance to resolution of shareholders: "50,001–260,000 to G. R. Nicholas; 260,001–400,000 to the "Trustees of Betty, Lindsay, Nola and Hilton."

Each of the above resolutions was carried in the presence of, and with the consent of, all the shareholders of the company. In the books of the company, journal entries and ledger account entries were made, giving effect to these three resolutions. The Unallotted Capital Account in the ledger shows that on April 15, 1926, cash was paid for the 50,000 shares then issued, and, as regards the issue of 350,000 shares, there is an entry, under date September 25, 1934, "By "Reserve Account 350,000*l*."

The parties are agreed that the shares were issued as fully paid. The sum of 350,000*l*., which was applied in satisfaction of the amount due on the shares, was undistributed profits of the company, and the shares were distributed among the shareholders in proportion to their holdings in the company;

210,000 shares were issued to the appellant, which were at all material times of a value of 210,000*l.*

The question stated by the learned county court judge for the opinion of the Supreme Court was as follows: "Should "the assessment of taxable income for the purposes of (1.) "Special Tax and (2.) Unemployment Relief Tax, have included "the said amount of 210,000*l.* ?"

Their Lordships are of opinion, on consideration of these facts, that a sum of 210,000*l.* was credited to the appellant from the profits of the company within the meaning of the statutory provisions above quoted, and they agree with the views expressed by the majority of the High Court. This sum was therefore rightly included in the assessment of the appellant to unemployment relief tax and special income tax. It thus becomes unnecessary to consider the other view, expressed by Gavan Duffy J., of the Supreme Court of Victoria, namely, that the shares themselves were a bonus distributed or credited from profits within the meaning of the statutory provisions, and their Lordships express no opinion on this view.

There can be no doubt that the company applied a sum of 210,000*l.* from undistributed profits in satisfaction of the amount of the liability which would otherwise have rested on the appellant on the allotment of the 210,000 shares, which was made with his consent, and thus, by the action of the company, the appellant received a benefit in the issue to him of shares credited as fully paid by an application of undistributed profits. In the second place, the distribution of the shares and the application of undistributed profits was among the shareholders only, and was in proportion to their holdings in the company, and the application of undistributed profits was also in those proportions, and therefore in the proportions which would regulate the distribution of a dividend. In their Lordships' opinion, such an application by the company of an appropriate proportion of undistributed profits for the benefit of the shareholder is aptly described as crediting the shareholder with the amount necessary to render the shares fully paid, the source of the credit being profits of the company.

It is said that this conclusion is inconsistent with the principles laid down by the House of Lords in *Inland Revenue Commissioners* v. *Blott.* (1) In the first place, it must be observed that that decision proceeded on different statutory provisions, and it requires to be shown that the reasoning of the decision is clearly applicable to the Victorian statutes here in question. That such need for care is required is well illustrated by the comments in *Blott's* case (1) on the decision of this Board on a Western Australian statute in *Swan Brewery Co., Ld.* v. *The King* (2), the limits of which were further discussed in *Commissioner of Income-tax, Bengal* v. *Mercantile Bank of India, Ld.* (3)

As stated by Rowlatt J. in *Blott's* case (4): "What I do "lay stress on is that one has to look for a 'payment.' Now I "do not think that there is a payment of a dividend to a "shareholder unless a part of the profits of the company is "thereby liberated to him in the sense that the company "parts with it, and he takes it. If, in this case, the company "could have found means to capitalise their profits and "divide them as capital without adopting the machinery of "declaring a bonus and allotting shares by agreement (not, "be it observed, a voluntary agreement) in satisfaction of "such bonus, I do not think the case would have been arguable. "I am asked to decide that there was a 'payment' of this "bonus upon the strength of what I consider bare machinery. "I cannot do so. The fact is simply that the shareholder was "given shares instead of a bonus."

The decision of Rowlatt J. was affirmed by the Court of Appeal and by the House of Lords, and the reasoning of the majority in the House of Lords follows that of Rowlatt J. Lord Haldane says (5): "My Lords, for the reasons I "have given I think that it is, as matter of principle, "within the power of an ordinary joint stock company with "articles such as those in the case before us to determine "conclusively against the whole world whether it will

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(1) [1921] 2 A. C. 171.
(2) [1914] A. C. 231.
(3) [1936] A. C. 478.
(4) [1920] 1 K. B. 133.
(5) [1921] 2 A. C. 184.

"withhold profits it has accumulated from distribution "to its shareholders as income, and as an alternative not "distribute them at all, but apply them in paying up the "capital sums which shareholders electing to take up unissued "shares would otherwise have to contribute. If this is done "the money so applied is capital and never becomes profits "in the hands of the shareholder at all."

Viscount Finlay says (1): "The resolution of February 8, "1915, was, that for the purposes of capitalizing 33,333*l.* 6*s.* 8*d.*, "part of the undivided profits of the company, a bonus on "each of the issued ordinary shares be declared, and that "the directors be authorized to satisfy such bonus by the "distribution among the members holding ordinary shares "of 33,316 of the unissued second preference shares of "1*l.* each, credited as fully paid up. The effect of this operation "was that the amount of the bonus was retained by the "company as additional capital, and that the shareholders got "the new preference shares. No option was left to any "particular shareholder. He was compelled by the action of "the company to take the preference shares. He could not "have sued for the bonus in money, as the resolution which "gave the bonus uno flatu declared that it was to be satisfied "by the distribution of preference shares. Under these "circumstances it seems to me impossible to treat the share-"holders for the purpose of super-tax as having received the "bonus and paid it back to the company to be retained as "capital. They never received it at all."

He then quotes with approval the passage already quoted from the judgment of Rowlatt J. Viscount Cave states (2): "The resolution did not give to any shareholder a right to sue "for the dividend in cash, his only right being to have an "allotment of fully-paid shares in the capital of the company. "The profits remained in the hands of the company as capital, "and the shareholder received a paper certificate as evidence "of his interest in the additional capital so set aside. The "transaction took nothing out of the company's coffers, and "put nothing into the shareholders' pockets."

(1) [1921] 2 A. C. 194. (2) Ibid. 200.

These statements may be summarized as follows: Although in form a dividend was declared, it was inevitably at once applied to payment of the capital sums which the shareholders would otherwise have had to contribute. The share of profits so applied was never in the hands of the shareholder, nor had he ever a right to sue for it. Therefore, in no sense could the shareholder be said to have received payment or to have had the right to demand payment of a share of the profits, which, in such an event, would have formed part of his income for the purposes of British super-tax.

But it seems equally clear that the learned Lords accepted the view that the shareholder was credited with the discharge by such payment of his liability for payment in full on allotment. Lord Haldane refers to the application of the profits "in paying up the capital sums which shareholders electing "to take up unissued shares would otherwise have to con-"tribute," and, in another passage he refers to (1) "the case "of a company using a reserve over which it had full power of "disposition, in order to make payments out of it for the "benefit of the existing shareholders of capital sums which "they would otherwise have had to contribute for the purchase "of new shares." Lord Finlay refers to the satisfaction of the bonus by distribution of the shares "credited as fully paid up." But this is made even clearer by their statements that the principles laid down in *Bouch* v. *Sproule* (2) were equally applicable in *Blott's* case. (1) In that case, not only was a dividend declared, but a dividend warrant for the money amount of the dividend was sent to each shareholder, although the shareholder was bound, under the terms of the resolution, to sign and return the warrant, which contained an authority from the shareholder for the application of the amount of the warrant in payment of the call on the shares. Clearly, in the opinion of their Lordships, in that case the dividend, even if not "paid" or "distributed," was "credited" to the shareholder from the profits of the company, and the fact that the credit was used for the discharge of a capital liability, however relevant in a question of British super-tax, is not relevant in the case of the Victorian statutes, under which it is to be deemed to form part of his assessable income.

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(1) [1921] 2 A. C. 171, 187.

(2) (1887) 12 App. Cas. 385.

Their Lordships would add that the decision of the House of Lords in *Ooregum Gold Mining Company of India* v. *Roper* (1) was before the House in *Blott's* case (2), and it cannot be taken that the learned Lords, who formed the majority in the latter case, intended to lay down any principle which was inconsistent with the earlier decision, in which it was made clear that liability for the amount due on the issue of shares is on the allottee, and the liability must be satisfied from some source external to the company, in money or money's worth, an example of which might consist of the discharge of the company's legal indebtedness for goods supplied or services rendered by the allottee ; but that would mean crediting the allottee with the sum due by the company and, with his consent, applying the credit in discharge of the allottee's liability on the shares. In this view, it was correct, in *Blott's* case (2), to treat the shareholder as credited with the amount of the dividend, although he had no right to get the amount into his hands or to sue for it.

Their Lordships are therefore of opinion that *Blott's* case (2) is not only distinguishable from the present case, in view of the difference of the statutory provisions under consideration, but that the reasoning of the speeches in *Blott's* case (2) above referred to, is helpful in illustrating the contrast between the two cases.

On the other hand, the Australian Federal legislation is nearly akin to the Victorian statutes as regards the matter under consideration ; but their Lordships desire to make clear that they consider that the meaning of the provisions of the Victorian statutes under consideration is clear and unambiguous, and they do not find it necessary to consider their historical genesis, or to trace their parentage to the Federal Legislation of 1915, or the decision of the High Court in *James* v. *Federal Commissioner of Taxation.* (3) But the decision in *James's* case (3) is helpful as regards the meaning

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(1) [1892] A. C. 125.
(2) [1921] 2 A. C. 171.
(3) (1924) 34 C. L. R. 404.

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of the words "dividends, interest, profits or bonuses credited "or paid" to a shareholder. The decision was unanimous, and *Blott's* case (1) was discussed and distinguished on grounds similar to those already expressed by their Lordships. In the present case, the majority of the learned judges base their decision on the reasoning in *James's* case (2), and their Lordships agree with their views, and in particular with the analysis of *James's* case (2) made by Rich J. The earlier case of *Webb* v. *Federal Commissioner of Taxation* (3) related to a distribution in the winding up of the old company, which had been reconstructed, of shares in the new company, which formed part consideration for the latter company's purchase of the undertaking of the old company, and these facts led to a contrary result to that in *James's* case (2), but similar views were expressed as to the proper construction of the Act of 1915.

Their Lordships are of opinion that a dividend, profit or bonus of 210,000*l.* was credited to the appellant from the profits of the company, and that the question stated by the learned county court judge should be answered in the affirmative.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the High Court of Australia, dated March 25, 1938, should be affirmed. The appellant will pay to the respondent his costs in the appeal.

Solicitors for appellant: *Stafford Clark & Co.*
Solicitors for respondent: *Freshfields, Leese & Munns.*

(1) [1921] 2 A. C. 171.
(2) (1924) 34 C. L. R. 404.
(3) (1922) 30 C. L. R. 450.

[PRIVY COUNCIL.]

J. C.* 1940 May 7.

FAKISANDHLA NKAMBULE . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SPECIAL COURT OF SWAZILAND.

Swaziland—Criminal law—Murder—Plea of " guilty " by one of two accused—Joint trial as on plea of " not guilty "—Plea of " guilty " remaining on record—Confession—Admissibility of evidence—Irregularity—No substantial injustice—Law of Evidence Proclamation (Transvaal), No. 16 *of* 1902, *s.* 20*—Transvaal Criminal Procedure Code, Ordinance No.* 1 *of* 1903, *s.* 162.

The appellant, a native chief of Swaziland, having been charged with inciting H., a native medicine doctor, to murder certain persons, pleaded " not guilty." H., on arraignment, pleaded " guilty," but although that plea was entered on the record, and no alteration of it was made at any time on the record, the judge presiding at the trial said that the proper course was to enter a plea of " not guilty," and in the result the trial proceeded as a joint trial of the appellant and H. as if each had pleaded " not " guilty." Each of the accused gave evidence, and was cross-examined both on behalf of the prosecution and the other accused, and the evidence of H. implicated the appellant as having incited him to commit the murders :—

Held, that while it would appear that if the Court had acted in strict accordance with s. 20 of the Transvaal Law of Evidence Proclamation, 1902, and the practice thereon, it should have taken evidence aliunde that the crime charged had been committed, and then have sentenced H. on his plea of guilty before he gave evidence, thereafter calling him as a Crown witness, when he could not have been cross-examined by the Crown, it would still have been necessary to corroborate his evidence, and it could not be said that the departure from what apparently was the correct Transvaal procedure was departure of substance from the principles of justice. H. in the course of the joint trial having made an admission of his guilt which amounted to a confession, his evidence that the appellant had incited him to commit the murders was no part of his confession of having committed them, and was admissible against the appellant in respect of the charge against him.

While it would appear that South African practice does permit a court to enter a plea of " not guilty " in certain circumstances, it was irregular in this case to leave on the record the plea of " guilty " after in effect altering it to one of " not guilty," but that irregularity did not in this case entail any real prejudice to the appellant, and no substantial and grave injustice had been done, and the conviction should be affirmed.

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* *Present :* LORD THANKERTON, LORD JUSTICE GODDARD, and SIR PHILIP MACDONELL.

Rex v. *Fatshawa and Matluli* (1930) S. C. R. (Trans. P. D.) 526, distinguished as not having been a joint trial.

Dictum of Curlewis C.J. in *Rex* v. *Zawels and Another* (1937) S. A. L. R. (A. D.) 342, at 348, applied.

In re Abraham Mallory Dillet (1887) 12 App. Cas. 459, 467, referred to.

Judgment of the Special Court of Swaziland affirmed.

Appeal (No. 37 of 1939), by special leave, from a judgment of the Special Court of Swaziland (October 15, 1938), whereby the appellant, Fakisandhla Nkambule, a Subordinate Chief of Swaziland, was convicted of murder and sentenced to death.

The appellant was jointly charged and tried with one Nhloko Hlatshwako, a native medicine doctor, for the murder of one of the appellant's wives, Mbuko Dhlamini, his brother, Mpindela, and that brother's wife, Patekile Hlope, at Buseleni on September 11, 1937. Nhloko Hlatshwako was charged with the actual commission of the murders, and the appellant with having incited him to commit them. The appellant had pleaded "not guilty," and his co-accused "guilty."

The facts appear fully from the judgment of the Judicial Committee.

The Special Court of Swaziland (Sir Walter Huggard (President), H. B. A. McCarter, Esq., Deputy Resident Commissioner, and R. Armstrong, Esq., District Commissioner, sitting with Chief Dalada Dhlamini as a Native Assessor) found both the accused guilty, and sentenced them to death.

1940. April 18, 19, 22. *Horace Douglas K.C.* and *S. N. Bernstein* (of the English and South African Bars) for the appellant. The Court below said that the case against the appellant depended mainly upon the evidence of the Crown witness Nyandeni, of the first accused (Hlatshwako), and on the documentary evidence. Both the Court below and the Attorney-General expressed the opinion that the evidence of Nyandeni tended to exculpate the appellant, and the Crown's evidence having, therefore, failed at the first step, the Crown relied upon the evidence of the first accused, that is to say, the murderer, and, as corroboration, relied on the three letters A, B and C, which were written in Swazi. There were two translations of those letters, made at different times, which differed materially in content, and an incriminating sentence which appeared in letter B as used at the trial was not in the original letter. The Court departed from the first rule with regard to the proof of evidence referred to in *Reg.* v. *Bertrand.* (1) That sentence, which was introduced into letter B (see the judgment of the Board), was put to the first accused separately from the rest of the letter, and the words appeared to suggest that he had been instructed to use medicine to poison people. That was a vital matter. The appellant's case was that he never had any part at all in the ceremony at which the poison was administered; that he was not there, and had nothing to do with the matter. The Crown's case was that the appellant had suspected six persons, among whom were the three murdered persons, of causing the death of his mother, who died in 1936, and of his daughter, who died in 1937. There was no oral evidence to support that suspicion, and it was proved in evidence that there was no knowledge of any ill-feeling between the appellant and any of the murdered persons. The evidence of the appellant was that his daughter had died of fever.

There are three points: it is said, first, that no objection having been taken at the time the letters were put in that they had not been properly proved by evidence, it could not be taken now. That is not the law. The second point is whether the evidence of the first accused, which amounted to a confession, was admissible as against the appellant in the joint trial. Thirdly, what is the procedure on arraignment and the taking of pleas? Could the judge in Swaziland alter a plea of "guilty" in a joint trial to one of "not guilty"? The law of the Transvaal is Roman Dutch law as modified by any particular statute, and the Transvaal law is applied in Swaziland by a Proclamation. [Reference was made to the Law of Evidence Proclamation (Transvaal), No. 16 of 1902, s. 20; and the Criminal Procedure Code, 1903 (Ordinance

(1) (1867) L. R. 1 P. C. 520, 534.

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No. 1 of 1903, Transvaal).] The law as to the practice in joint trials on joint charges in the Transvaal is different from the English practice. Where on arraignment one or more of the accused pleads guilty and one or more of the accused pleads not guilty, then if a plea in mitigation by one or other of the co-accused pleading guilty includes evidence implicating the co-accused pleading not guilty, such evidence is inadmissible against the co-accused pleading not guilty during the joint trial: *Rex* v. *Fatshawa and Matluli.* (1) The Court was not entitled to enter the plea of "not guilty" on behalf of the first accused: *Rex* v. *Rajkumar.* (2) There is no express authority in the Criminal Procedure Code for entering the plea of "not guilty." [Reference was also made to Hawkins, Pleas of the Crown, 8th ed., vol. ii., c. 31.] On the facts of the present case it is submitted that there was a mistrial because the letters A and B, on which the Court relied as corroboration, were not proved. Throughout the trial the Court was proceeding under the misconception that the words relied upon were in the original letter B, whereas in fact they were not. That was regarded as the chief piece of evidence in the case, and it was said that the inference of guilt could not be "got over."

[*Sir Terence O'Connor S.-G.* (intervening): There is no doubt that the sentence of which complaint is made does not appear in the original letter B; it is contended, however, that even excluding those words, the Court could have come to the conclusion they did.]

It is submitted that without the sentence in the letter the Court might well have come to a contrary conclusion to that at which they arrived.

S. N. Bernstein followed. The letters should have been disregarded in toto; what they meant in the English language was not before the Court. Under s. 162 of the Criminal Procedure Code the Court had no power to alter the plea to one of "not guilty." On a joint trial a co-accused who pleads guilty cannot give admissible evidence against his

(1) (1930) S. C. R. (Trans. P. D.) 526.
(2) (1931) S. C. R. (Natal P. D.) 160.

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co-accused, and that applies to the plea made by the accused ; the plea that has to be regarded is the plea on arraignment : *Rex* v. *Zawels and Another.* (1) The evidence of the first accused in this case must be treated as a confession, and if after the plea of "guilty" on arraignment a plea of "not "guilty" is entered, and his evidence is admitted against the appellant, the appellant's fair trial must have been prejudiced. [Reference was made to s. 173 (*a*) of the Criminal Procedure Code.] The whole of the evidence of the first accused was a confession, and therefore inadmissible under s. 20 of the Law of Evidence Proclamation, No. 16 of 1902. The evidence of the letters and of the first accused should be ruled out, and without them there was not sufficient to convict.

Sir Terence O'Connor S.-G. and *Kenelm Preedy* for the Crown. The appellant assumes the burden that is laid down in *In re Abraham Mallory Dillet* (2) ; he alleges that the form of judicial process is infringed in two respects : first, in the failure to prove the translation of the letters, and secondly, in entering a plea of "not guilty" for the first accused. It appears to be suggested that there has been a violation of natural justice by the use of a faulty translation. It is perfectly clear that the original letters were proved in evidence : the witnesses had put to them piece by piece portions of those letters, and agreed to their contents. Letter B is almost as significant for what it omits as for what it puts in.

[Counsel was not required to deal further with the letters, or with what effect faultiness of translation might have had on the result of the case.]

With regard to the evidence of the first accused, it is submitted that there was evidence sufficient to convict even if the first accused had never been called at all—that without his evidence the Court must have come to the same conclusion at which it arrived. It is further contended, however, that there is no foundation here for the suggestion that the evidence of the first accused was not rightly admitted. If he had pleaded "not guilty" all the evidence would have been available against the appellant, and even if he had been sentenced after pleading "guilty" it would still have been available. There is only one sentence in a capital case, so the objection about calling a witness before sentence does not exist to the same extent. There is no defect here. The entering of the plea of "not guilty" was in the exercise of the Court's inherent jurisdiction: Code of Criminal Procedure. There is nothing in that Code to give any guidance, or to enable the Court to meet the kind of situation which appears, where somebody ignorant of the law perhaps confesses guilt of something of which he is really not guilty: Gardiner and Lansdown on South African Criminal Law and Procedure, 2nd ed., vol. i., pp. 238, 255-7. There is just the same inherent power in the South African Courts as there is in the English Courts. There was here a joint trial on pleas of "not guilty," and that joint trial was conducted without any objection or application for a separation of the issues as between the two accused, and in those circumstances it is impossible to say that the evidence of the first accused was not admissible. The authorities which have been cited are of little assistance; once there is an issue between an accused and the Crown his evidence is available for all purposes. In South Africa, as *Rex* v. *Zawels and Another* (1) shows, the law as laid down in *Rex* v. *James Paul* (2) has been adopted, which enables the evidence to be available for all purposes. There is nothing here defective in form of sufficient gravity to entitle the appellant to succeed.

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(1) (1937) S. A. L. R. (A. D.) 342, 345–6.

(2) (1887) 12 App. Cas. 459, 467.

Horace Douglas K.C. replied.

May 7. The judgment of their Lordships was delivered by SIR PHILIP MACDONELL. This is an appeal, by special leave, from the Special Court of Swaziland, which had convicted the appellant of murder. The appellant and a certain Nhloko Hlatshwako, who will be referred to hereafter as the first accused, were indicted before the Special Court of Swaziland for the murder of certain three persons, the first accused as

(1) (1937) S. A. L. R. (A. D.) 342. (2) [1920] 2 K. B. 183.

having actually committed the murders and the second accused, the appellant, as having incited him to commit them. The Special Court convicted them both, but it is only the second accused who appeals.

The appellant is a native chief in Swaziland, a territory under the protection of the Crown, and governed as to the law of evidence by the Transvaal Law of Evidence Proclamation, No. 16 of 1902, and as to criminal procedure by the Transvaal Criminal Procedure Code, Ordinance No. 1 of 1903. The essential facts in the case were these. The appellant's mother died in 1936 and a daughter of his in 1937, and somewhere in July or August of 1937 he sent his "doctor," the witness Nyandeni, to find someone who had the knowledge and skill necessary to make a rope and put it on the graves of these two deceased persons so that by its agency the dreams troubling him might be turned from him and those responsible for the two deaths discovered; the rope, it was believed, would by some inherent magic kill the persons responsible. The witness Nyandeni eventually found the first accused who, according to him, undertook to perform this rope ceremony. The appellant had duties as Court "induna" at Hlatikulu, the chief town of Swaziland, which kept him there during the weekdays, and following on instructions by him, the witness Nyandeni wrote the letter A, which was signed in the name of the appellant, and was addressed and duly delivered to the first accused. This letter states (inter alia) that the appellant's children "are finished," i.e., dead, that the person killing them is at the appellant's village, that the appellant is busy and cannot come personally, that the first accused must bring all his medicine bags with him, that "it is the Chief Fakisandhla "who is calling him," and that the "advance payment" is ready. In accordance with this letter the first accused came to the witness Nyandeni's village on a day which can be fixed as Thursday, September 9, 1937, and Nyandeni wrote to the appellant saying that he had arrived. In reply, the appellant dictated to the witness Memorial two letters, B addressed to Nyandeni, and C addressed to the first accused, both in the same envelope, and it is in evidence that the contents of each letter became known to Nyandeni and to the first accused. In letter B the appellant says that he understands that the first accused has arrived and is unwilling to do the work until he has seen him, the appellant, but that his duties at Hlatikulu prevent him from coming. Letter B goes on, "it is necessary "that this man [i.e., the first accused] should carry on because "you know that it is Mpindela, Mbuko, Majalimane and "Ngilane." The first two of these so named are two of the three persons proved to have been murdered by the first accused; the other two persons named were at all material times absent and at a distance. The next words in letter B, according to the translation before the Court at the trial, were "as far as the others are concerned, the medicine will take its "course," but according to affidavits sworn after the trial, and put in as part of the printed record before their Lordships, this portion of the letter should have been translated "on the "other hand, the work itself will simply proceed," with no mention of medicine. In this letter B the appellant then speaks of advance payment, and enjoins stealth or secrecy in doing the work, also that no one must be told. In letter C the appellant tells the first accused that he understands what he is saying, and that he will himself come on Sunday. Nyandeni and the first accused will have received these letters on Friday, September 10, 1937, and the same day they went to one of the appellant's villages, called Buseleni, where Nyandeni pointed out to the first accused, Mpindela and Mbuko, named in letter B, and also one Patekile, a woman, whose name was not in letter B, but whom the appellant said he had mentioned to the witness Memorial when dictating that letter to him. It is clear that somehow her name was mentioned, and had become known to Nyandeni and the first accused. As some of the members of the village were absent, Nyandeni and the first accused did nothing that day, but returned to Nyandeni's village. Next morning, Saturday, September 11, they came again to the village Buseleni, and the first accused, with the inhabitants ranged in a half circle before him, proceeded to conduct a witch-doctor inquiry. He had two earthenware pots, one on a fire, and a smaller one which he held up to his breast. On his own admission the smaller pot contained two separate substances, one harmless, the other arsenic, and by a little manipulation he administered the harmless substance to the rest of the village, but arsenic to the two persons Mpindela and Mbuko, mentioned in letter B, and also to Patekile, whose name the appellant says ought to have been in letter B, whereby these three persons died the same day. Admittedly nothing was done with regard to the rope which, according to the appellant and the witness Nyandeni, the first accused had been called in to make. Nyandeni, who throughout his evidence sought to exculpate the appellant, had to admit that the first accused had said earlier that he would use the earthenware pot, a thing that would have nothing to do with the rope ceremony, but which could be used to give the villagers something from it to swallow, and so to test their responsibility for the matter to be discovered, whatever that might be.

On Sunday, September 12, the appellant came over to Nyandeni's village, as he had promised, and gave the first accused 2*l.* 10*s.*, and a promise of some cattle. His behaviour at this interview with the first accused was inconsistent with his having ordered any rope ceremony—and since no rope had at that time been made the first accused had not done anything then to earn any payment—and was evidence that he had called in the first accused for the purpose of killing the three deceased persons. His letters and his behaviour on the Sunday were corroboration of the evidence of the first accused, that the appellant had sent for him to kill these three people as being responsible for the deaths of his mother and daughter, and had never asked the first accused to do the rope ceremony at all. Assuming that the evidence of the first accused was admissible, and that the letters were properly before the Court of trial, it had before it sufficient evidence for finding the appellant guilty of inciting the first accused to commit these murders.

Two main points were urged to their Lordships in support of this appeal. When the first accused and the appellant, as second accused, were arraigned, the appellant pleaded " not

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"guilty." The first accused pleaded "guilty," but prior to his doing so his counsel said that his client intended to make a full confession of the murders, but would also say "in defence" that he had committed them at the instigation of the appellant, a tribal chief, and in the belief that the Paramount Chief of the tribe knew what he was doing. The President of the Special Court said that he thought the proper course was to enter a plea of "not guilty" in the case of each accused. The Attorney-General, appearing for the Crown, agreed to this, but there is nothing of record as to whether the several counsel for first accused and for appellant said anything; presumably they consented to the Court's suggestion. The clerk of the Court had entered on the record a plea of "guilty" for the first accused, and no alteration of this plea was at any time made on the record. The trial then proceeded as a joint trial of the two accused as if each had pleaded "not guilty." For the defence the first accused and the appellant each gave evidence, and were cross-examined by the Attorney-General, and each was cross-examined on behalf of the other accused. The evidence of the first accused, an accomplice, implicated the appellant as having incited him to murder the three deceased.

It was argued before their Lordships that this procedure was wrong by reason of s. 20 of the Transvaal Proclamation, No. 16 of 1902, "No confession which may be made by any "person shall in any case be admissible as evidence against "any other person," and that the correct procedure in accordance with that section and with Transvaal practice thereon would have been to take evidence aliunde that the crime charged had been committed, and then to have sentenced the first accused on his plea of guilty, thereafter calling him as a witness for the Crown, on the principle that before his evidence could be used to implicate any person mentioned therein he should by reason of having already been sentenced, have nothing to fear or hope when giving that evidence. In the present case, however, being one of murder, one sentence only was possible. Counsel for the appellant cited *Rex* v. *Fatshawa and Matluli* (1), where the Transvaal Provincial

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(1) (1930) S. C. R. (Trans. P. D.) 526.

Division quashed a conviction in which a third accused, after plea of guilty, but before sentence, gave evidence against the two other accused. In that case, however, the third accused, after his plea of guilty, though invited to take part in the case by asking questions, declined to do so, the only thing he did being to give at the end of the case for the Crown, evidence, part of which implicated the other two accused. That case, then, is distinguishable as not having been a trial of that third accused jointly with the two other accused, while the present case, in the course it took, was a joint trial of the two accused, as if on a plea of not guilty for each of them. Further, it would appear that South African practice does permit a Court to enter a plea of not guilty on behalf of a native, or other ignorant person, pleading guilty, if it considers that he does not properly understand the effect of that plea, or if he seems to have matter of exculpation that he wishes to allege: see Gardiner and Lansdown, South African Criminal Law and Procedure, 2nd ed., vol. i., at pp. 238, 255 and 257. Here the first accused, through his counsel, said that he wished to state certain facts—which therefore would need proof—that he thought furnished some defence for what he had done, namely, that the man inciting him was a chief, and that the Paramount Chief knew what he intended to do. There was some authority, then, for the procedure of the Court in this case, though it certainly was irregular to allow the first accused's plea of guilty to remain on the record and not to alter it to one of not guilty. The difference between what the Court did do and what strictly it would seem that it ought to have done in accordance with s. 20 of the Transvaal Proclamation, No. 16 of 1902, and the practice thereon, amounted to this: if the first accused had been sentenced before giving evidence and had then been called as a witness for the Crown, the Attorney-General could not have cross-examined him; in the course taken the first accused was witness for the defence, so the Attorney-General could, and did, cross-examine him. But in either event it would still have been necessary to corroborate his evidence, and it cannot be said that the departure from what apparently

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is the correct Transvaal procedure was departure of substance from the principles of justice. In connection with this s. 20 of Transvaal Proclamation, No. 16 of 1902, making confessions inadmissible, reference was made to *Rex* v. *Zawels and Another* (1), where Curlewis C.J. said that on a joint indictment and a joint trial evidence given by one of the accused is admissible against the other, adding (2) "If in the course of "giving such evidence one of the accused makes an admission "of his guilt amounting to a confession, though such admission "may not be admissible as evidence . . . . against any other "of the accused but only as against himself, the rest of his "evidence stands and is admissible like that of any other "witness so far as it incriminates any of the other accused "of the charge for which they are being tried," which is the case here ; the evidence of the first accused that the appellant had incited him to commit the murders was no part of his confession of having committed them. In the opinion of their Lordships, the irregularity of leaving on the record a plea of guilty after in effect altering it to one of not guilty did not entail any real prejudice to the appellant.

The other argument in support of this appeal turned on the letters produced, letter A written by the witness Nyandeni in the name of the appellant, and letters B and C written by the witness Memorial, at the appellant's dictation. The originals in the Swazi tongue were produced and sworn to, but the language of the Court was English, and no one was called to prove their English meaning, that is, a translation. An English translation was put in and used at the trial, but was not sworn to, and it would seem that, as stated above, there was a mistake therein as to the English meaning of a particular sentence in letter B. If there was no evidence produced to the Court as to the meaning in English of those letters, then the Court could not look at them, and their contents would not be before it. (It is quite possible that all parties to the case accepted by consent the translation which had been made, but not sworn to.) Detailed examination of the evidence given at the trial shows, however, that the meaning in the three letters of each sentence implicating the appellant was proved, though in piecemeal fashion. The witness Nyandeni was taken through each material sentence in letter A, and admitted each to give correctly what the appellant had dictated to him, and the Court interpreter will have rendered Nayandeni's answers into English. The material sentences in letters B and C were put to the appellant, and he admitted that he had dictated these to the witness Memorial; again, the interpreter will have rendered his answers into English. In these sentences, so proved, the appellant requested the first accused to bring his medicine-bags—obviously with medicine in them—named the persons to whom the attention of the first accused was to be directed, and enjoined secrecy, and that nobody was to be told. In the opinion of, their Lordships, the words wrongly supposed to be in letter B do not materially add to or diminish the incriminating nature of other passages in that letter, and their corrected translation does not effect any material change in their meaning.

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(1) (1937) S. A. L. R. (A. D.) 342. (2) Ibid. 348.

Their Lordships are satisfied that if the Court of trial had had before it a correct instead of an incorrect translation of the disputed words in letter B, it must still have arrived at the same conclusion that it did arrive at, namely, that appellant incited the first accused to commit these murders.

Their Lordships regret the irregularities in the trial of this case, but are satisfied that they are not of such a character as would justify interference with the decision appealed from. The scope of such interference is well understood, and it is only necessary to cite the words of Lord Watson in *In re Abraham Mallory Dillet* (1): "The rule has been repeatedly "laid down, and has been invariably followed, that Her "Majesty will not review or interfere with the course of criminal "proceedings, unless it is shewn that, by a disregard of the "forms of legal process, or by some violation of the principles "of natural justice, or otherwise, substantial and grave "injustice has been done," and it is clear that no such injustice has been done in the present case.

(1) 12 App. Cas. 459, 467.

Their Lordships are therefore of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *E. F. Hunt & Co.*
Solicitors for the Crown: *Burchells.*

[PRIVY COUNCIL]

J. C.*
1940
May 27.

LIQUIDATOR, RHODESIA METALS, LIMITED (IN LIQUIDATION) . . . } APPELLANT;

AND

COMMISSIONER OF TAXES . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION).

South Africa (Southern Rhodesia)—Revenue—Income tax—Mining claims—Purchase and development by English company for purposes of sale—Profit—Source—War Taxation and Excess Profits Duty Ordinance, Southern Rhodesia, No. 20 *of* 1918, *ss.* 4, 5, 10.

The sole business operation of an English company was the purchase of immovable property—mining claims—in Southern Rhodesia, and their development in that territory for purposes of transfer there at a profitable price, and the company never adventured any part of its capital except on those mining claims. Both the contracts of purchase and subsequent sale were made in England, and the consideration for the sale was received there:—

Held, that the company received the sale price from a source within the territory, namely, the mining claims which had been acquired and developed there for the very purpose of obtaining the particular receipt, and that so much of it as was profit was accordingly assessable to income tax under the War Taxation and Excess Profits Duty Ordinance, No. 20 of 1918, of Southern Rhodesia.

Order of the Supreme Court of South Africa (Appellate Division) (1938) S. A. L. R. (A. D.) 282, affirmed.

APPEAL (No. 9 of 1939) from an order of the Appellate Division of the Supreme Court of the Union of South Africa (March 22, 1938), affirming an order of the High Court of Southern Rhodesia (October 7, 1937), whereby an appeal by the appellant, the liquidator of Rhodesia Metals, Ld., against an assessment to income tax made upon him in Southern Rhodesia in the sum of 146,000*l.* for the year ended March 31, 1936, was dismissed.

Rhodesia Metals, Ld. (hereinafter called "the company"),

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

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v.
COMMISSIONER OF TAXES.

was incorporated in England on November 30, 1935, as a private company, with a nominal capital of 10,000*l.*, of which 8002 shares of 1*l.* each were issued and fully paid up. On the same date the St. Swithins Ores and Metals, Ld., was incorporated as a private company with a nominal capital of 100,000*l.* Sir Edmund Davis, who was chairman of, and a large shareholder in, each of the two companies, and who was entitled to a number of mining claims in Southern Rhodesia, sold some of them to the company on December 12, 1935, for 5000*l.* cash. On January 27, 1936, at an extraordinary general meeting, a special resolution was passed that the company should be wound up voluntarily, and a liquidator was appointed. In the short period of its existence the company had spent about 2000*l.* in development work on the claims in Southern Rhodesia. On February 28, 1936, the liquidator of the company wrote to St. Swithins Ores and Metals, Ld., offering to sell the whole undertaking of the company, including 2180*l.* in cash, subject to its liabilities, for cash and shares; and the St. Swithins company, on March 3, 1936, offered to buy the whole undertaking as offered for 152,000*l.*, payable as to 150,000*l.* in fully-paid shares, and as to 2000*l.* in cash. By a special resolution of the members of Rhodesia Metals, Ld., that offer was accepted, and the transaction duly completed, and the mining claims transferred on the register to the St. Swithins company. The agreement giving effect to the terms was negotiated and made in England, and the consideration payable thereunder was received by the appellant liquidator wholly in England.

On or about January 5, 1937, the appellant received notice of assessment to income tax in the sum of 146,000*l.*, made on the basis that the company had sold its mining claims for 152,000*l.*, and had made a profit, after allowing 6000*l.* for expenses, of 146,000*l.* It was claimed that that sum was taxable income within the meaning of the War Taxation and Excess Profits Duty Ordinance, No. 20 of 1918, in that it arose from business or trade carried on in Southern Rhodesia, where the source was accordingly situate.

Objections by the appellant having been disallowed, he appealed to the High Court of Southern Rhodesia (Hudson J.), who dismissed the appeal, and a further appeal was dismissed by the Appellate Division of the Supreme Court of South Africa (Stratford C.J., de Wet, Tindall JJ.A., and Feetham A.J.A., de Villiers J.A. dissenting). The appeal is reported. (1)

It was admitted on the hearing of the present appeal that the company had acquired the mining claims for the purpose of selling them, not of working them.

1940. April 25, 29, 30, May 1. *J. M. Tucker K.C.* and *Terence Donovan* for the appellant. There are two main points: first, is the profit taxable in view of the fact that it arose by virtue of a sale by the liquidator in the course of his statutory duty to sell? Secondly, if it is, was the source of that profit in Southern Rhodesia? [Reference was made to the War Taxation and Excess Profits Duty Ordinance, No. 20 of 1918, ss. 4; 5; 10; 14; 35, sub-s. 12; 45; 51; 46, 36, sub-s. 2; and 59.] The main ground on which the appellant relies is the "source" point. Hudson J., in the High Court of Southern Rhodesia, held in effect that, the mining claims being in Southern Rhodesia, the company was carrying on business there, and therefore the profit was taxable on the footing that the source of the profit was the fact that a business was being carried on. In the Appellate Division the main ground was that the capital employed in this case was the mining claims, or the money put into them when they were purchased, and that was situated in Southern Rhodesia. It is submitted that the property itself does not put any liability on anybody to pay anything, but that the contract which has been entered into with the purchaser does. The words of s. 5 of the Ordinance are "the total amount . . . . "received . . . . from any source within the Territory"; there must be something which gives rise to that receipt. The land by itself gives rise to no receipt, but the moment a contract to sell is entered into then the right to a receipt arises, and eventually the money will be received. The question is, from whom and from what is it received? It is received as a result of the contract : *Commissioners of Taxation* v. *Kirk.* (1) There must be a business before any receipt can be treated as a taxable receipt : *Chennels* v. *Commissioner of Taxes.* (2) The law in South Africa in this respect is very similar to that of Southern Rhodesia. In *Commissioner of Taxes* v. *Booysens Estates, Ld.* (3), which was decided under Act 28 of 1914 of South Africa, the facts are very like those of the present case. In those cases in which the question of "source" has been gone into, it is the business, and not merely the individual transaction, which is the source. [Reference was made to *Graham* v. *Green* (*Inspector of Taxes*) (4), and *Commissioner of Taxes* v. *William Dunn & Co., Ld.* (5)] In the present case the source of the income was wholly outside Southern Rhodesia, and for the purpose of this submission it is admitted that the sale by the liquidator was one by the company in the course of its business of buying and selling these claims. In *Dunn's* case (5) the source was held to be the London business and the capital employed in it. In *Studebaker Corporation of Australasia, Ld.* v. *Commissioner of Taxation* (*N.S.W.*) (6) the ratio of the decision was that the income arose from the business of the American company transacted in America. *Overseas Trust Corporation, Ld.* v. *Commissioner for Inland Revenue* (7), a decision on Act No. 41, of 1917, of South Africa, is, it is submitted, exactly the same as the present case, except that whereas in that case there was a company in the Union with property outside it, which it bought and sold, and it was held that the source was in the Union, in the present case there is an English company resident in England, buying and selling in England property outside, namely, the mining claims in Southern Rhodesia. If there can only be one source of income then that case should have determined the case now before the Board ; the Court below, however, did not in fact follow the law as laid down by itself in that case some years before—it was cited to the Court. One proposition which that case would appear to establish is that where the business is mere purchase and sale of property, the business is not carried on where the property that is bought and sold is situated. The capital employed in the business is not situated where the property purchased is situated, it is employed in the country in which it is in fact embarked—where the purchase of the property is made. With regard to s. 10 of the Ordinance No. 20 of 1918, for the purpose of "deeming," the place of delivery is treated as immaterial, it is the place of the making of the contract. For the purpose of taxation the emphasis has always been placed where the contract is made. The ratio decidendi in *Lovell & Christmas, Ld.* v. *Commissioner of Taxes* (1) was applied in *Dunn's* case. (2) While the question is obviously one of mixed fact and law, there must be some test. The appellant cannot ask the Board to lay down a universal test for every sort of business, but where, as in modern business, the essence of the business is mere purchase and sale, it is submitted that the business is carried on where the purchase and sale are in fact made, and not where the property is situated. The profit arises from the business, and therefore it arises from the source, and therefore the situs of the business is the situs of the source. [Reference was made to *Income Tax Commissioner, Madras* v. *Diwan Bahadur S. L. Mathias* (3); *Millin* v. *Commissioner for Inland Revenue* (4); *Inland Revenue Commissioners* v. *Korean Syndicate, Ld.* (5); *Greenwood* v. *F. L. Smidth & Co.* (6); and *Commissioners of Taxation (N.S.W.)* v. *Meeks* (7)] The net result of the last cited authorities is that the source of the profits is the business. The question is whether the appellant company ever carried on its business to any extent in Southern Rhodesia; it only expended about 2000*l.* on development of the mining claims. Where there is some doubt as to the area of taxation in a taxing Act it is permissible to look at the machinery to see whether it has provided the requisite machinery for extracting the tax which it is claimed is chargeable: *Colquhoun* v. *Brooks* (1); and s. 35, sub-s. 1; s. 36, sub-s. 2; and s. 45, of Ord. No. 20 of 1918, which should be read with s. 51, sub-s. 7; and ss. 69, 46, 48, 49, 50 and 59. Where the case is that of a foreign company, or an individual, with no place of business, no office, and no person in the Territory receiving the money on its or his behalf, then there is no person who could be a representative taxpayer.

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(1) (1938) S. A. L. R. (A. D). 282.

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(1) [1900] A. C. 588, 590.
(2) (1936) S. Rhod. L. R. 100, 103–4.
(3) (1918) S. A. L. R. (A. D.) 576, 592–4, 598, 601, 605.
(4) [1925] 2 K. B. 37.
(5) (1918) S. A. L. R. (A. D.) 607, 613,
(6) (1921) 29 C. L. R. 225, 232.
(7) (1926) S. A. L. R. (A. D.) 444, 457.

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(1) [1908] A. C. 46, 49, 51.
(2) (1918) S. A. L. R. (A. D.) 607.
(3) (1938) L. R. 66 I. A. 23.
(4) (1928) S. A. L. R. (A. D.) 207.
(5) [1921] 3 K. B. 258, 275.
(6) [1922] 1 A. C. 417.
(7) (1915) 19 C. L. R. 568, 578.

Summarising the result of the above argument, the first proposition is that the sale of property produces a capital receipt unless the purchase or other acquisition and the sale are transactions effected in the course of carrying on a business or trade: *Chennels's* case (2) and *Booysens Estate's* case. (3) The second proposition is that there is only one source of a receipt; the whole source cannot be two totally different things each situated in a different place. There appears to be no authority for that proposition, but, as has been said, the plainer a proposition is, the harder it is to find authority for it. The third proposition is that the act or acts, if more than one, which have the effect of producing the receipt, constitute the source: *Lovell & Christmas, Ld.* v. *Commissioner of Taxes.* (4) In Ordinance No. 20 of 1918 *Kirk's* case (5) is dealt with in s. 35, sub-s. 12 (*b*). The fourth proposition is that when transactions which form part of the trade or business are being dealt with, it is not permissible to look at the individual transaction itself solely for the purpose of ascertaining the situation of the source: *Dunn's* case (6) and the *Studebaker* case. (7) Therefore the place where the trade or business is carried on must alone be looked at. The next proposition is a negative one; that where the business consists of purchasing and selling properties, the mere situation of the property dealt in is irrelevant: *Overseas Trust Corporation* case (8), and Ingram's South African Income Tax Law, at p. 74. Moreover, the mere situation of the property dealt in is immaterial on the question as to where the business is carried on. So, whatever test is applied, whether the business or the capital employed in it, the situation of the property purchased is irrelevant. Next, if the capital employed in the business is the test, that is, if that is the source, then the situation of the capital is where it was embarked in the business: *Dunn's* case (1); *Overseas Trust Corporation* case (2); and Ingram's Income Tax Law, at p. 74. The next proposition, which is applicable only to non-residents, is that a trade is not exercised or carried on in a country merely because purchases are made in that country: abstract of case of *Sulley* v. *Attorney-General.* (3) Lastly, there is no authority which lays down that the source is the place where the property sold is delivered. A mining claim is an incorporeal right: *Spearman and Madgen* v. *Snodgrass and the Amalgamated Properties of Rhodesia.* (4)

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(1) (1889) 14 App. Cas. 493.
(2) (1936) S. Rhod. L. R. 100.
(3) (1918) S. A. L. R. (A. D.) 576.
(4) [1908] A. C. 46.
(5) [1900] A. C. 588.
(6) (1918) S. A. L. R. (A. D.) 607.
(7) (1921) 29 C. L. R. 225.
(8) (1926) S. A. L. R. (A. D.) 444.

The other point is that it is contended that this was a sale of the whole undertaking by the liquidator in the performance of his duties in winding up the company. It is a lump sale, and therefore the Crown cannot pick out one of the items included in the lump sale and treat the sale of the mining claim as a separate sale. In the ordinary way, a sale by a liquidator of the whole undertaking of the company is a capital transaction. It is accepted by both sides that in order that any receipt should be a taxable receipt it must be one arising in the course of carrying on a trade or business. Therefore the question is, was the liquidator carrying on the company's trade in entering into this agreement? If he was not, no part of the receipt could be "gross income." [Reference was made to *Leeming* v. *Jones.* (5)] The company never carried out the bargain which it was negotiating; the liquidation began and the liquidator sold the whole undertaking. It was a different transaction altogether; it was a sale by him in the course of his duty: *Wilson Box (Foreign*

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(1) (1918) S. A. L. R. (A. D.) 607.
(2) (1926) S. A. L. R. (A. D.) 444.
(3) (1860) 2 Tax Cas. 149.
(4) (1912) 2 S. Rhod. L. R. 161, 166.
(5) [1930] 1 K. B. 279; [1930] A. C. 415.

Rights), *Ld.* (*in Liquidation*) v. *Brice* (*H.M. Inspector of Taxes*). (1) On this point the English cases are much in point, and it is submitted that upon the basis of the *Wilson Box* case (1) there is really no evidence here that the liquidator was doing anything else but realizing the company's property.

Terence Donovan followed. The judges of Southern Rhodesia treat the decisions of the Appellate Division of the Supreme Court of South Africa as governing them. There is no liability to income tax unless the income is derived from something in the nature of a trade; and the source was the business: s. 5 of Ordinance No. 20 of 1918. Unless there is a business there is no liability: *Rhodesia Railways and Others* v. *Commissioner of Taxes* (2), and *Ex parte Wheeler.* (3) *Maclaine & Co.* v. *Eccott* (4) is authority for saying that delivery is not the factor which will put the trade in some country other than the place where the contract is made. Here everything except delivery took place outside Southern Rhodesia.

Roland Burrows K.C. and *Reginald Hills* for the respondent. The task of the Board is to ascertain whether, according to the statutory provisions, the decision of the Court below is correct. Many decisions upon a number of different statutes in vastly different wording have been cited on behalf of the appellant. The result has been that there has been produced an amalgamation of dicta directed to various cases on particular circumstances, and it has been sought to extract something like a general principle, which it is suggested the Board should adopt and declare to be the law. The scheme of Ordinance No. 20 of 1918, however, is entirely different from the scheme which is adopted in this country. There are two points. First, whether the receipt is one from a source within the territory; and, secondly, whether it is of a capital nature. Unless it is shown to be of a capital nature it is income. There has been in this case a confusion between two things, namely, business in the sense of the business of the company, and business in the sense that there is a business transaction of the company. The question must always be, have the acts in question been such as to constitute the exercise of a trade ? It is impossible for an English company which carries on a railway business abroad, or any business which involves the occupation and use of hereditaments, to carry on that business without also carrying on business in a place other than that where the control is exercised. It is contended that the source of the profit here in question was a source within the territory. [Reference was made to ss. 5, 52 and 53 of the Ordinance.] The evidence is that there was work done by the company in Southern Rhodesia, and that is evidence of the carrying on of the operation of business in Southern Rhodesia. The company, for the purposes of its business, sunk its capital in Southern Rhodesia. It resold, and that is the operation which it is admitted that the company was formed for. It was formed for a business operation in Southern Rhodesia, and the question is, was the source of the receipt in Southern Rhodesia ? That is a question which depends upon the facts of each particular case, and in the present case the only place where the business operation in question could be said to have taken place is Southern Rhodesia. As to the nature of mining claims, see the Mines and Minerals Act, No. 16 of 1935, of Southern Rhodesia, ss. 2, 6, 100, sub-s. 7. The three judges below found that the business operation concerned in this case was the investing of the money in these claims for development, and reselling them ; they all held that that was the dominant factor.

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(1) (1936) 20 Tax Cas. 736.

(2) (1925) S. A. L. R. (A. D.) 438, 462.

(3) (1918) S. Rhod. L. R. 90, 91.

(4) [1926] A. C. 424, 431–2.

Reginald Hills followed. The authorities on the United Kingdom legislation do not go the length the appellant contends, or give the amount of assistance he seeks to obtain from them, and for three reasons. First, they are all on specific charging words in Sch. D, which are not contained in the Southern Rhodesian Ordinance at all. Secondly, even if it is assumed that those words were in the Rhodesian Ordinance, the English cases do not establish the proposition that the place of the making of the contract is the conclusive test ; there are other tests as well. Thirdly, all those cases deal with the sale of goods ; no one has ever dealt with speculation in land. [Reference was made to *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1) ; *Commissioners of Taxation* v. *Kirk* (2) ; *Millin* v. *Commissioner for Inland Revenue* (3) ; and *Overseas Trust Corporation, Ld.* v. *Commissioner for Inland Revenue* (4).]

In *Thomas Turner (Leicester), Ld.* v. *Rickman* (5) it was laid down that the delivery of goods in the United Kingdom would be trading. An incorporeal hereditament is still a hereditament, and exists in the country where it is. Where is this transaction—the individual matter ? The generality of the business must not be looked at. The business operation from which the profit arose was clearly carried on in Southern Rhodesia, and the source of the profit was within the Colony. The Southern Rhodesian Government are naturally opposed to the idea that mining claims can be sold without tax being paid.

The income charged by the assessment was derived from a source within Southern Rhodesia for the purpose of the definition of " gross income " in s. 5 of Ordinance No. 20 of 1918 as amended by subsequent enactments. Substantially the whole capital of the company was invested in mining claims in Southern Rhodesia, and the profit derived by the company from the acquisition, development and disposal of the claims arose from the profitable employment of its capital in the mineral fields of Southern Rhodesia. There is no ground in law or in fact for the contention of the appellant that because the company selling the claims and the company buying them were resident outside Southern Rhodesia, and the agreement for the sale of the claims was executed and the price payable thereunder was paid outside Southern Rhodesia, the source of the profit was not within Southern Rhodesia. Under the agreement of March 5, 1936, the sale of the mining claims was expressly made subject to the mining laws of Southern Rhodesia, and the transfer of the claims from Rhodesia Metals, Ld., to the St. Swithins company was, and had to be, done and effected in Southern Rhodesia at the office of the Mining Commissioner. The profit arising from the transfer of land or rights in land in Southern Rhodesia, and the employment of capital in the acquisition and disposal of such property, was in the contemplation of the Legislature of Southern Rhodesia when enacting the Ordinances as being a proper subject for income tax, and comes within the definition of income derived from a source within the Territory.

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(1) [1896] A. C. 31.
(2) [1900] A. C. 588.
(3) (1928) S. A. L. R. (A. D.) 207.
(4) (1926) S. A. L. R. (A. D.) 444.
(5) (1898) 4 Tax Cas. 25.

Terence Donovan replied, and on the meaning of " productive "employment of capital " referred to *Commissioner of Taxes* v. *Booysens Estates, Ld.* (1) ; *Commissioner of Taxes* v. *William Dunn & Co., Ld.* (2) ; and *Overseas Trust Corporation, Ld.* v. *Commissioner for Inland Revenue* (3) ; the phrase is used in the same sense as " carrying on business." The mere facts that the asset bought was in Southern Rhodesia, and the final delivery had to be made there, are not sufficient to justify a finding that the business was carried on there when the contracts of purchase and sale were made in England. The test applied in the *Overseas Trust Corporation* case (3) should have been applied in the present case—where the capital was spent in the purchase of the asset which was afterwards sold.

May 27. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the Appellate Division of the Supreme Court of the Union of South Africa, who affirmed a decision of Hudson J. in the High Court of Southern Rhodesia, dismissing an appeal by the liquidator of the appellant company from an assessment to income tax in the sum of 146,000*l.* for the year ending March 31, 1936. The assessment was made under the provisions of the Ordinance of Southern Rhodesia, No. 20 of 1918. It is desirable to set out some of the sections of that Ordinance :—

(1) (1918) S. A. L. R. (A. D.) 576, 582–3.
(2) (1918) S. A. L. R. (A. D.) 607, 611–12.
(3) (1926) S. A. L. R. (A. D.) 444, 447.

"Section 4 (1.): There shall be charged, levied and collected "throughout the Territory, subject to such conditions and "to such exemptions and abatements as are hereinafter "provided, an income tax, at the rate and calculated in "the manner specified hereunder, in respect of any taxable "income received by or accrued to or in favour of any "person . . . .

"Section 5: For the purposes of this Chapter—'gross "'income' means the total amount other than receipts or "accruals proved by the taxpayer to be of a capital nature, "received by or accrued to or in favour of any person in any "year or period assessable under this Chapter from any "source within the Territory or deemed to be within the "Territory . . . . an amount shall be deemed to be derived "from a source within the Territory if it is received by or "accrues to or in favour of any person ordinarily resident in "the Colony or whose principal place of business is situate "therein or whose business is wholly or partly managed "therefrom . . . . 'income' means the amount remaining of "the gross income of any person for any such year or period "after deducting therefrom any amounts exempt from income "tax in the hands of such person: 'taxable income' means "the amount remaining after deducting from the income of "any person all the amounts other than abatements allowed "as deductions under this Chapter; . . . .

"Section 10: Income shall be deemed to have accrued to "any person from a source within the Territory, where it has "been received by or has accrued to or in favour of such "person by virtue of—(1.) any contract made within the "Territory for the sale of goods, whether such goods have "been delivered or are to be delivered in or out of the Territory; "(2.) any service rendered or work or labour done in the "carrying on in the Territory of any business, trade, profession "or occupation . . . .

"Section 35: (12.) (*b*) Where a non-resident person produces, "grows, mines, creates, manufactures, fabricates, improves, "packs, preserves or constructs in whole or in part anything "within this Colony, and exports the same without sale prior "to the export thereof, he shall be deemed to be carrying on "business within this Colony and to have derived from a "source within this Colony a proportionate part of any profit "ultimately derived from the sale thereof outside of this "Colony. The Commissioner shall have full discretion of "determining such proportionate part. (*c*) Nothing in "paragraph (*b*) of this sub-section shall in any way affect the "generality of the term 'carrying on business' as used else-"where in the Ordinance."

Two questions arose on the appeal: 1. Was the amount assessed in respect of a receipt proved by the taxpayer to be of a capital nature? 2. Was it an amount received from any source within the territory?

1. The first question was decided against the appellant by all the judges in South Africa. It appears to be a question of fact, and as there are concurrent findings in the High Court of Southern Rhodesia and in the Supreme Court of the Union, the only question that would arise would be, was there evidence to support the findings? It is not necessary to state in detail the facts relating to this contention. It is sufficient to say that the appellant company was incorporated on November 30, 1935, as a private company, with a nominal capital of 10,000*l.*, of which 8002*l.* was issued. The chairman, and a large shareholder, was Sir Edmund Davis. On the same day the St. Swithins Ores and Metals, Ld., was incorporated as a private company with a nominal capital of 100,000*l.* Sir Edmund Davis was also chairman, and a large shareholder in this company. On December 5, 1935, Sir Edmund Davis, who was entitled to a number of tungsten mining claims in Southern Rhodesia, sold a number of them to the St. Swithins company for 37,500*l.*, and on December 12, 1935, he sold certain other of his mining claims to the Rhodesia Metals company for 5000*l.* cash. On January 20, 1936, the St. Swithins company increased its capital by an amount of 200,000*l.* On January 27, 1936, at an extraordinary general meeting of the company, a special resolution was passed that Rhodesia Metals be wound up voluntarily. Mr. Weatherley was appointed liquidator. The company in

the short space of its existence had spent 2000*l*. in development work on the claims in Southern Rhodesia. On February 5, 1936, the liquidator wrote to St. Swithins company offering to sell the company's mining claims for 150,000*l*., to be satisfied in fully-paid shares, an offer which St. Swithins accepted by a letter next day. On February 28, 1936, the liquidator wrote to St. Swithins stating that he had discovered that the company was entitled to further mining claims, and was subject to possible liabilities in respect of claims, royalties, etc., and offered in substitution for the former agreement to sell the whole undertaking of the company, including 2180*l*. in cash, subject to its liabilities, for cash and shares. On March 3, 1936, St. Swithins wrote offering to buy the whole undertaking as offered for 152,000*l*., payable as to 150,000*l*. in fully-paid shares, and 2000*l*. in cash, and on March 5, 1936, by special resolution of the members of Rhodesia Metals, it was resolved to accept the offer. The transaction was duly completed, and the mining claims transferred on the register from the Southern Rhodesia company to the St. Swithins company. Prima facie, the sale by a liquidator of the whole undertaking of a company would result in a capital asset; but in the view of Hudson J. the Rhodesia Metals company had acquired the claims as an operation of business for the purpose of developing and selling them in furtherance of a scheme of profit-making. In the view of the learned judge the liquidation, and the offer of sale by the liquidator, merely formed part of the original scheme of profit-making, and the amended offer of the sale of the whole undertaking was in the circumstances an immaterial variation of the business operation. As seen by Stratford C.J., it was the culminating step in the scheme designed when the claims were bought, and was made for the purpose of concluding the operation of profit-making which was on hand when the liquidation was commenced. There appears to be ample evidence upon which the learned judges in South Africa could come to the conclusion which they reached on this issue, and on this point the appeal must fail.

2. It was, however, strenuously urged throughout the

appeal here, as in South Africa, that the price received was not a receipt from a source in Southern Rhodesia. The respondent, it was said, was faced with a dilemma. The contention is that this was a capital sum; if so, the tax is clearly not exigible. But if it was not a capital sum it was only because it was the result of a business operation; if so, the only source is the business; and the place where the business is carried on is the source of the profit made by the business; and as there can only be one source for one business profit, you have only to see where the business was carried on which earned that profit; and that place is England, where the head seat and directing power was situate, and where both the contracts of purchase and sale were made, and where the consideration for the sale was in fact received. In support of the contention, numerous cases founded on the various Income Tax Acts, English, Australian, New Zealand and South African, were cited chiefly as to business in buying and selling commodities, such as *Lovell and Christmas* v. *Commissioner of Taxes* (1) (New Zealand); *Maclaine* v. *Eccott* (2) (England); *Studebaker Corporation of Australasia, Ld.* v. *Commissioner of Taxation for New South Wales* (3) (Australia); and two South African cases, *Commissioner of Taxes* v. *William Dunn & Co., Ld.* (4); and *Overseas Trust Corporation, Ld.* v. *Commissioner for Inland Revenue.* (5)

Their Lordships have no criticisms to make of any of those decisions, but they desire to point out that decisions on the words of one statute are seldom of value in deciding on different words in another statute, and that different business operations may give rise to different taxing results. If the charging words of the English statute are looked at, "(i.) annual profits or gains arising to any person, (ii.) residing "in the United Kingdom from any trade wherever carried "on, and (iii.) whether resident in the United Kingdom from "any trade exercised within the United Kingdom"; they are obviously different from the Southern Rhodesian charging words, " total amount [other than capital] received by . . . . "any person . . . . from any source within the Territory." It is desirable, also, to point out that, at any rate for different taxing systems, income can quite plainly be derived from more than one source even where the source is business. For instance, in the case of the business of a railway company whose railway is situate abroad, as in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), while the English company may be assessed in England on the whole of its profits because it carries on part of its business there, yet it could not be doubted that so much of the profits of the business as were in fact earned from running the railway in Brazil were derived from exercising a business in Brazil; and still less could it be doubted that the sums received by the company in Brazil were received from a source in Brazil. In the present case their Lordships do not find it necessary to formulate a definition which will afford a universal test of when an amount is " received from a source within the "territory." A doubt may be expressed whether the words borrowed by Stratford C.J. from Innes C.J. in the *Overseas Trust* case (2) " productive employment of capital " really help to define the situation. Is capital productively employed in the place where it purchases stock which is profitably sold elsewhere? or in the place where the stock which now represents the capital is sold? or, for purposes of the test, must both purchases and sales occur in the same place? or is it sufficient that the place of the direction of the employment of the capital in purchasing or selling should denote where the capital is productively employed? Perhaps, in other words, it may be said, does it mean more than carrying on business in a place? Their Lordships incline to the view quoted with approval from Mr. Ingram's work on South African Income Tax Law by de Villiers J. in his dissenting judgment: " Source means not a legal concept, but some-"thing which a practical man would regard as a real source "of income"; " the ascertaining of the actual source is a "practical hard matter of fact." At any rate, in the present

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(1) [1908] A. C. 46.
(2) [1926] A. C. 424.
(3) (1921) 29 C. L. R. 225.
(4) (1918) S. A. L. R. (A. D.) 607.
(5) (1926) S. A. L. R. (A. D.) 444.

(1) [1896] A. C. 31.
(2) (1926) S. A. L. R. (A. D.) 444.

case, whatever may be the right view of the source of receipts derived from trading in commodities, their Lordships find themselves dealing with a case where the sole business operation of an English company is the purchase of immovable property in Southern Rhodesia and its development in that territory for purposes of transfer in that territory at a profitable price. The company never adventured any part of its capital except on that or those immovables. As a hard matter of fact the only proper conclusion appears to be that the company received the sum in question from a source within the territory, namely, the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Holmes, Son & Pott.*
Solicitors for respondent: *A. F. & R. W. Tweedie.*

[PRIVY COUNCIL.]

LEVY . . . . APPELLANT;

AND

ASSICURAZIONI GENERALI . . . . RESPONDENTS.

J. C.*
1940
June 3.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Insurance (Fire)—Conditions exempting from liability—Construction—Civil commotion—Contractual onus of proof.

A condition in a policy of fire insurance issued by the respondent company to the appellant provided (inter alia) that the insurance did not cover any loss or damage occasioned by or contributed to by certain specified occurrences, including " civil commotion," and further provided that " In any action, suit or other proceeding, where the Company alleges that by reason of the "provisions of this Condition any loss or damage is not covered "by this insurance, the burden of proving that such loss or "damage is covered shall be upon the insured " :—

Held, that, as a matter of agreement between parties, the onus of proof of any particular fact, or of its non-existence, may be placed on either party in accordance with the agreement made between them, and that therefore the onus of proving that one or other of the occurrences specified in the condition existed at the time of the fire which occasioned the loss was on the insured.

Dictum of Scrutton L.J. in *In re Hooley Hill Rubber & Chemical Co. and Royal Insurance Co.* [1920] 1 K. B. 257, 273, referred to.

Statement as to meaning of " civil commotion " in Welford and Otter-Barry's Fire Insurance, 3rd ed., p. 64, approved.

Cooper v. *The General Accident, Fire, and Life Assurance Corporation* (1922) 128 L. T. 481; and *Motor Union Insurance Co., Ld.* v. *Boggan* (1923) 130 L. T. 588, referred to.

Judgment of the Supreme Court of Palestine (1938) Pal. L. R. 597, reversed.

APPEAL (No. 34 of 1939) from a judgment of the Supreme Court of Palestine (December 8, 1938), reversing a judgment of the District Court of Jaffa (June 16, 1938).

On November 13, 1936, the appellant, Samuel M. Levy, entered into a contract of insurance with the respondent company, Assicurazioni Generali (The General Insurance Co., Ld., of Trieste and Venice), against loss or damage by fire in respect of a stock of merchandise deposited in a warehouse situate in the commercial centre of Jaffa. The terms of the contract were embodied in a policy of insurance issued to the appellant by the respondent company, and condition 6—the only one material to this appeal—provided (inter alia): "This insurance does not cover any loss or damage . . . . "occasioned by . . . . any of the following occurrences . . . . , "namely :— . . . . (2.) War, invasion, act of foreign enemy, "hostilities or warlike operations (whether war be declared or "not), mutiny, riot, civil commotion, insurrection, rebellion, "revolution, conspiracy, military, naval, or usurped power, "martial law or state of siege, or any of the events or causes "which determine the proclamation or maintenance of martial "law or state of siege. Any loss or damage happening during "the existence of abnormal conditions . . . . except to the "extent that the insured shall prove that such loss or damage "happened independently of the existence of such abnormal "conditions.

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* *Present:* LORD THANKERTON, LUXMOORE L.J., and SIR PHILIP MACDONELL.

"In any action, suit or other proceeding, where the Company "alleges that by reason of the provisions of this Condition "any loss or damage is not covered by this insurance, the "burden of proving that such loss or damage is covered shall "be upon the insured."

The facts and the relevant terms of the policy are set out fully in the judgment of the Judicial Committee.

On December 14, 1936, a fire occurred in the warehouse containing the insured stock, and damage amounting to £P.1900 was caused thereto. The respondent company, alleging that the appellant's claim to payment of that sum was not covered by the policy, because one or other of the occurrences specified in sub-clause 2 of condition 6 existed at the time when the fire occurred, refused payment of the claim. The appellant, on March 30, 1937, instituted proceedings in the District Court of Jaffa, claiming payment by the respondent company of the £P.1900, with interest and costs. At the trial, evidence was given by the Assistant District Superintendent of Police at Tel-Aviv of the state of unrest in Palestine at the relevant period.

The District Court, after holding that the onus of proving the existence of one or other of the occurrences specified in sub-clause 2 of condition 6 was on the respondent company, gave judgment for the appellant for the sum claimed.

On appeal by the respondent company to the Supreme Court of Palestine (Trusted C.J., Greene and Frumkin JJ.), it was held that on the true construction of condition 6, the onus of proving that the loss was covered and was not excluded by condition 6 was on the insured, and in the result the appeal was allowed. The appeal is reported at (1938) Pal. L. R. 597.

1940. April 23. *Valentine Holmes* for the appellant. The question is as to the construction of condition 6. That condition can be divided into three paragraphs, the first being "This insurance does not cover" down to "state of siege," and the next two paragraphs are the second and third paragraphs of the condition. The first paragraph sets out the exceptions, and the second and third paragraphs do not enlarge those exceptions in any way. It follows that, if the question of where the burden of proof lies is left out of account, in order that the loss shall not be covered it must be established by somebody that it was occasioned by a riot, civil commotion, etc. There would appear to be no doubt that if there was only the first paragraph, and not the second and third paragraphs, and the appellant had proved loss by fire, the insurers would have to prove that the facts brought the exception into operation. The words "abnormal conditions" in the second paragraph are qualified by "whether physical or otherwise," and those latter words must refer back to the two groups enumerated in paragraph one. If that be right, the type of abnormality of conditions is either earthquakes, typhoons, etc., or riot, civil commotion, or one of the other things actually enumerated in group two causing the abnormality. It is submitted that there is no evidence of abnormality due to riot, civil commotion, etc. The burden of proving that there were no abnormal conditions within the meaning of this condition existing on December 14, 1936, is on the appellant, and it is submitted that he has established that there were not.

Tristram Beresford K.C. and *A. W. Baker Welford* for the respondents. The burden of proof is clearly upon the insured, because in paragraph three he has entered into a bargain to that effect. That clause was inserted because in the ordinary way it would be for the insurance company to establish that the loss fell within some exception which relieved them. The Emergency Regulations under the Palestine (Defence) Order in Council, 1931, were evidence of a state of civil commotion. Further, the decision of the Supreme Court can be supported on two grounds: first, there was the evidence of the Assistant District Superintendent of Police at Tel-Aviv; and secondly, judicial knowledge which the Court itself might have of the circumstances then existing. Somebody has only to show that the loss was "proximately or remotely, "occasioned by or contributed to" by any of the specified occurrences; it is sufficient that in the neighbourhood of recent times there had been matters which could amount to civil commotion. The burden was on the appellant to prove that there were not abnormal conditions, or that the loss or damage happened independently of such abnormal conditions, and he has not discharged that burden. The evidence, taken with the Emergency Regulations, show that there was a state of civil commotion at that time. It is conceded that "civil "commotion" is the only occurrence relied upon by the respondents. [Reference was made to *Motor Union Insurance Co., Ld.* v. *Boggan* (1); *Cooper* v. *The General Accident, Fire, and Life Assurance Corporation* (2); *London and Manchester Plate Glass Co., Ld.* v. *Heath* (3); and Welford and Otter-Barry's Fire Insurance, 3rd ed., at p. 64.] This case falls within the exceptions; the loss was remotely connected with civil commotion, and the appellant has not discharged the onus which was upon him.

Valentine Holmes replied. The evidence established that there were not abnormal conditions such as are contemplated by condition 6. At the highest the Emergency Regulations only show that steps were being taken to prevent riots or civil commotion. The appellant can only prove the negative by showing what the positive condition is.

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(1) (1923) 130 L. T. 588, 590.
(2) (1922) 128 L. T. 481.
(3) [1913] 3 K. B. 411.

1940. June 3. The judgment of their Lordships was delivered by LUXMOORE L.J. On November 13, 1936, the appellant entered into a contract of insurance against loss or damage by fire with the respondent company in respect of a stock of merchandise deposited in a warehouse situate in the commercial centre, Jaffa. The terms of the contract are embodied in a policy of insurance issued by the respondent company to the appellant. The only condition material to be considered in this appeal is condition 6. It is in the following terms:—

"This insurance does not cover any loss or damage which "either in origin or extent is directly or indirectly, proximately "or remotely, occasioned by or contributed to by any of the "following occurrences, or which, either in origin or extent "directly or indirectly, proximately or remotely, arises out "of or in connection with any of such occurrences, namely:— "(1.) Earthquake, volcanic eruption, typhoon, hurricane, "tornado, cyclone, or other convulsion of nature or atmospheric "disturbance. (2.) War, invasion, act of foreign enemy, "hostilities or warlike operations (whether war be declared or "not), mutiny, riot, civil commotion, insurrection, rebellion, "revolution, conspiracy, military, naval, or usurped power, "martial law or state of siege, or any of the events or causes "which determine the proclamation or maintenance of martial "law or state of siege.

"Any loss or damage happening during the existence of "abnormal conditions, whether physical or otherwise, directly "or indirectly, proximately or remotely, occasioned by or "contributed to by or arising out of or in connection with "any of the said occurrences shall be deemed to be loss or "damage which is not covered by this insurance, except to "the extent that the Insured shall prove that such loss or "damage happened independently of the existence of such "abnormal conditions.

"In any action, suit or other proceeding, where the Company "alleges that by reason of the provisions of this Condition any

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"loss or damage is not covered by this insurance, the burden "of proving that such loss or damage is covered shall be "upon the insured."

On December 14, 1936, a fire occurred in the warehouse containing the insured stock, and damage was caused thereto to an extent which was subsequently fixed by agreement between the parties at £P.1900.

The appellant claimed payment of this sum from the respondent company, but the latter refused to pay, alleging that the appellant's claim was not covered by the policy because one or other of the occurrences specified in sub-clause 2 of condition 6 existed at the time when the fire occurred.

On March 30, 1937, the appellant instituted proceedings against the respondent company in the District Court of Jaffa, claiming payment by the respondent company of the sum of £P.1900, with interest and costs. In the course of these proceedings a preliminary question was raised for the determination of the District Court, namely, whether the onus of proving the existence of one or other of the occurrences specified in sub-clause 2 of condition 6 of the policy lay on the appellant or on the respondent company. On January 27, 1938, the District Court held that the onus of proof was on the respondent company. As the result of this ruling, when the action subsequently came on for hearing on June 1, 1938, counsel for the respondent company called as a witness on behalf of that company the Assistant District Superintendent of Police at Tel-Aviv. No other witness was called either on behalf of the respondent company or of the appellant, and after hearing argument by counsel on behalf of both parties the District Court reserved judgment. On June 16, 1938, the District Court ordered the respondent company to pay to the appellant the sum of £P.1900, interest and costs. The basis of this decision, as appears from the written judgment of the District Court, is that the respondent company had not discharged the onus of proving that abnormal conditions existed at the date of the fire in the area where the warehouse was situate, the Court holding that the question whether the conditions were abnormal must be decided by comparing the conditions existing at the date when the policy was issued with those existing before April 19, 1936, when certain Emergency Regulations under the Palestine (Defence) Order in Council, 1931, were made by the High Commissioner for Palestine.

On July 12, 1938, the respondent company appealed to the Supreme Court of Palestine from the order of the District Court of Jaffa. The Supreme Court, on December 8, 1938, allowed the appeal, and set aside the judgment of the District Court, entering judgment for the respondent company, with costs in the Supreme Court and in the District Court. The appellant has appealed to His Majesty in Council from the judgment of the Supreme Court with the leave of that Court. The Supreme Court held that upon the true construction of condition 6 of the policy, if abnormal conditions were alleged by the respondent company to have existed at the date of the fire the onus of proving that the loss was covered, and was not excluded, by condition 6, was on the Insured and not on the respondent company. The Supreme Court dealt with this question in the following passage (1): "In the third paragraph "of the clause [i.e. of condition 6] the parties have expressly "agreed as to the onus of proof, and I know no reason why "they should not do so. It is true that the primary object "of a fire policy is to insure against fire, that it is often difficult "to prove how a fire emanates, and that the Company draws "up the policy, and in consequence, where there is an "ambiguity, Courts are inclined to construe it in favour of "the insured; but there seems to me to be no ambiguity in "the paragraph. 'Allege' does not mean 'prove,' and I "would point out with all respect to the Court below that if "its interpretation is applied this paragraph would appear to "be surplusage . . . . In the result, when the Company relies "upon the third paragraph it is for the insured to prove either "the absence of the exception, or that, if the exception existed, "it did not occasion or contribute to the loss and that the loss "did not arise out of it, or that the loss or the damage in cases "where abnormal conditions existed happened independently "of the existence of such abnormal conditions."

(1) (1938) Pal. L. R. 601.

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Their Lordships think this criticism of the ruling of the District Court with regard to onus of proof is well founded, and that the District Court was in error in holding that the onus of proving that one or other of the occurrences specified in sub-clause 2 of condition 6 existed at the time of the fire was on the respondent company. It was placed upon the appellant by the express terms of the contract. There can be no doubt that as a matter of agreement between parties the onus of proof of any particular fact, or of its non-existence, may be placed on either party in accordance with the agreement made between them (see *In re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.* (1), per Scrutton L.J.). The Supreme Court having thus disposed of the question of onus, proceeded to consider what the insured must prove if the Court is satisfied that abnormal conditions existed at the date of the fire, and pointed out, no doubt rightly, that in that case the insured must prove positively what was the cause of the fire, or that the abnormal conditions could not in any reasonable probability have caused the fire. The position is summed up by the Supreme Court in these words (2): "Bearing in mind, as I have said, that the object of a fire "insurance is to insure against fire, and that it is common "knowledge that in many cases it is difficult, if not impossible, "to prove the cause of a fire, and that the condition does not "provide that the Insured shall prove the cause of the fire, I "am of opinion that the Insured can discharge the onus of "showing that the abnormal conditions could not reasonably "have caused or contributed to the fire. In the result, subject "to the shifting to and fro of the onus of proof in order that "the plaintiff [i.e. the appellant] may recover, it is necessary "for the Court to be satisfied either that there was no abnormal "condition joined by a chain of causation to one of the events "set out in the earlier part of the condition, or that, if there "was that condition of affairs, it did not affect the fire."

Their Lordships see no reason to disagree with this summary if by the phrase "no abnormal condition joined by a chain of causation to one of the events set out" in condition 6 nothing

(1) [1920] 1 K. B. 257, 273. (2) (1938) Pal. L. R. 602.

more is meant than the non-existence of any one of the occurrences enumerated in sub-clause 1 or sub-clause 2 of the condition, for it seems plain as a matter of construction that the abnormal conditions referred to in condition 6 are not abnormal conditions generally, but such conditions as arise out of or in connection with any of the occurrences enumerated in the two sub-clauses. But the Supreme Court do not appear to have considered whether, on the evidence before the District Court, it was possible to hold that any one of the specific occurrences mentioned in sub-clause 2 existed at the date of the fire, because when criticizing the judgment of the District Court the Supreme Court states that the Court below "does not appear to have decided if conditions were "abnormal in the general sense, but to have decided that they "were normal within the contemplation of the parties in that "the state of affairs when the policy was issued is the standard "of normality . . . . to be applied." (1) The attitude of the Supreme Court is made clearer by a later passage in the judgment, which reads (2): "At the date of the fire the "Emergency Regulations [meaning those made by the High "Commissioner under the Palestine (Defence) Order in Council "1931, already mentioned] were in force—in itself that could "seem to be an abnormal condition, other than physical, "but it could hardly be suggested that the loss did not happen "independently of that."

It is to be observed that the passing of Emergency Regulations is not one of the occurrences specified in either of the sub-clauses of condition 6. The Supreme Court called attention to the evidence of the Assistant District Superintendent of Police in detail, the facts noticed being—(*a*) that after the removal of the curfew in the Jaffa area on October 26, 1936, fires took place frequently in that area; (*b*) the existing enmity between Jews and Arabs at the time of the fire; (*c*) the existence of a boycott which prevented Arabs from buying Jewish goods, and vice versa; (*d*) that it would not be safe for Jews to walk in the quarter where the warehouse was situated at 6.45 p.m. on December 14, 1936; (*e*) that

(1) (1938) Pal. L. R. 602. (2) Ibid. 603.

police patrols were carrying arms—rifles—at that date; (*f*) there were a number of outrages in December, 1936; in Jaffa a number of bombs were thrown. In addition to the evidence set out above it was admitted by the parties that an official communique was printed in the Palestine Post of October 16, 1936, under the heading Official Communique, Thursday, October 15. "There are no incidents to report "since noon yesterday. The public is informed that owing "to order having been restored and the absence of acts of "violence, in future Official Communiques will be issued only "when the occasion demands, and the daily issue of an Official "Communique as a matter of routine is being discontinued." No doubt, considered apart from any other occurrence, the facts stated might lead to the conclusion that the conditions in the area were abnormal at the material date, but, with all respect to the judgment of the Supreme Court, this is not the point. The point is, does the evidence establish that one of the occurrences mentioned in sub-clause 2 existed on December 14, 1936? Their Lordships invited Mr. Tristram Beresford, who appeared for the respondent company at this Board, to state which of the occurrences enumerated in sub-clause 2 of condition 6 he alleged was in existence at that date. He stated quite frankly that he did not think he could succeed except under the heading "civil commotion"; and he argued that the evidence established that such a condition, at the date of the fire, in fact existed. It is stated in "Welford and Otter-Barry's Fire Insurance," 3rd edition, at p. 64, that: "Civil "commotion. This phrase is used to indicate a stage between "a riot and civil war. It has been defined to mean an insur"rection of the people for general purposes, though not "amounting to rebellion; but it is probably not capable of "any very precise definition. The element of turbulence or "tumult is essential; an organised conspiracy to commit "criminal acts, where there is no tumult or disturbance until "after the acts, does not amount to civil commotion. It is "not, however, necessary to show the existence of any outside "organisation at whose instigation the acts were done."

This statement appears to their Lordships to be accurate,

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and to be borne out by the several authorities cited in the notes to the text. In their Lordships' judgment, the proved facts in this case fall far short of those which were held in *Cooper* v. *The General Accident, Fire, and Life Assurance Corporation* (1), and in the *Motor Union Insurance Co., Ld.* v. *Boggan* (2), respectively, to be sufficient to satisfy the phrase "civil commotion." Their Lordships are satisfied that on the facts proved there was no civil commotion in existence at the date when the fire occurred, and their Lordships so hold. Having regard to this finding, and to the admission made by counsel, already mentioned, their Lordships are bound to proceed on the footing that none of the occurrences specified in sub-clause 2 of condition 6 existed at the material date, and to hold that the respondent company's reliance on condition 6 fails. Their Lordships are consequently of opinion that the Supreme Court of Palestine was in error in holding that the appellant was not entitled to recover under the policy.

In the result, their Lordships are of opinion that the judgment of the Supreme Court ought to be set aside, and the judgment of the District Court of Jaffa restored, and that the respondent company should pay to the appellant his costs here and in the Supreme Court. They will therefore humbly advise His Majesty accordingly.

Solicitors for appellant: *Stanley & Co.*
Solicitors for respondents: *Dawes & Sons.*

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(1) 128 L. T. 481.

(2) 130 L. T. 588.

[PRIVY COUNCIL.]

J. C.*
1940
June 4.

BROWNLEE . . . . APPELLANT;

AND

MACMILLAN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Seduction—Unmarried woman's statutory right of action—Construction—Seduction Act, 1922, *R. S. A., c.* 102, *s.* 5.

An action under s. 5 of the Seduction Act, 1922, R. S. A., c. 102, which provides that " Notwithstanding anything in this "Act an action for seduction may be maintained by any unmarried "female who has been seduced, in her own name, in the same manner "as an action for any other tort and in any such action she shall "be entitled to such damages as may be awarded," has nothing to do with parental relations, or with the relation of master and servant, and nothing to do with loss of service or service, and there is no a priori probability that the section contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy, or illness directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in s. 5 which, in its natural and ordinary meaning, gives an unmarried female who has been seduced a right of action in her own name for damages.

Judgment of the Supreme Court of Canada (1937) S. C. R. (Can.) 318 affirmed.

APPEAL (No. 44 of 1938), by special leave, from a judgment of the Supreme Court of Canada (March 1, 1937), reversing a judgment of the Supreme Court of Alberta (Appellate Division) (February 2, 1935), which had affirmed a judgment of Ives J. (July 2, 1934), who had dismissed an action brought under the Seduction Act, 1922, R. S. A., c. 102, by the respondent, Vivian MacMillan, and her father, against the appellant, the Hon. John E. Brownlee, in which they severally claimed damages for the seduction of the respondent.

The jury found in favour of both plaintiffs, awarding the respondent $10,000 damages, and her father $5000. Ives J., the trial judge, expressed disagreement with the verdict of the jury, and subsequently, on the construction of the Seduction Act, gave judgment dismissing the action.

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* *Present:* VISCOUNT CALDECOTE L.C., VISCOUNT SANKEY, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROCHE.

On appeal by the respondent and her father to the Supreme Court of Alberta (Appellate Division) (Harvey C.J.A., Clarke, Mitchell, Ford, and Lunney JJ.A.), the father's appeal was unanimously dismissed. The respondent's appeal was dismissed by a majority (Clarke and Lunney JJ.A. dissenting).

The respondent then appealed to the Supreme Court of Canada (Sir Lyman P. Duff C.J., Rinfret, Kerwin and Hudson JJ., Davis J. dissenting), who allowed her appeal. The appeal is reported at (1937) S. C. R. (Can.) 318.

On the present appeal the only question argued before the Board was the construction of the Seduction Act. The provisions of the Act are set out in the judgment of the Judicial Committee. Sect. 5 of the Act provides that: "Notwithstanding anything in this Act an action for "seduction may be maintained by any unmarried female who "has been seduced, in her own name, in the same manner as "an action for any other tort and in any such action she shall "be entitled to such damages as may be awarded."

1940. March 11, 12. *Frank Gahan* for the appellant, submitted the following propositions on the statute—(*a*) To give a woman damages for the voluntary loss of her chastity is so radical a departure from the common law that the right should not be extended beyond the narrowest limits that are required by a reasonable interpretation of the words used in the legislation. (*b*) Although the action for seduction is based on loss of service, the action has developed into a remedy for sexual intercourse followed by pregnancy and childbirth. (*c*) The ordinary form of pleading in a seduction action alleges pregnancy and confinement. (*d*) In England, since the doubtful case of *Manvell* v. *Thomson* (1) in 1826, there has been no successful action for seduction without pregnancy. (*e*) The same position applies in Canada—no case of a successful action without pregnancy. That is qualified to the extent that while three of the cases do not show pregnancy on the face of the report, it was admitted by counsel that there had in fact been pregnancy in those cases. (*f*) Because pregnancy is the usual proof of loss of service in the majority of cases it was natural for the Legislature in the state of the authorities to assume, as Davis J. thought, that an action for seduction has given a remedy only where there was pregnancy and a child. (*g*) The Legislature has shown by s. 4 of the Seduction Act that it legislated on the assumption that an action for seduction was a remedy where pregnancy and childbirth have followed.

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(1) (1826) 2 C. & P. 303.

With regard to the evidence, it is admitted in the present case that there was no pregnancy ; there was no loss of service or disability from service. The Chief Justice in the Supreme Court referred to two decisions of the Appeal Court of Alberta, *Gibson* v. *Rabey* (1) and *Tetz* v. *Tetz* (2), decided in 1916 and 1921 respectively, both in the same sense, and concerned with the construction of s. 4 of the Ordinance of the North West Territories, 1903, which is the same terms as s. 5 of The Seduction Act in question. The Chief Justice stated that in so far as those cases involved a construction of that section, they could be taken to have received legislative sanction, since s. 5 was reproduced without material alteration in the Revised Statutes of Alberta, which came into operation in 1923. In support of that proposition he cited the rule in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* (3) It is submitted that the application of the principle in *Barras's* case (3) was negatived expressly by s. 10 of c. 49 of the R. S. A., 1922, which provides : " The Legislature is not to be deemed, "by reason of the Revised Statutes of Alberta, 1922, being so "substituted, to have adopted the construction, which, by "judicial decision, or otherwise, has been placed upon the "language of any of the Acts or Ordinances, or parts thereof, "included amongst the Revised Statutes." If damage, actual or presumptive, is the gist of the action for seduction, the appellant is entitled to succeed. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. xxii., p. 247,

(1) (1916) 9 A. L. R. 409.
(2) (1922) 18 A. L. R. 364.
(3) [1933] A. C. 402.

para. 428; p. 251, para. 436; *Manvell* v. *Thomson* (1); *Boyle* v. *Brandon* (2); *Beetham* v. *James* (3); *L'Esperance* v. *Duchene* (4); *Westacott* v. *Powell* (5); *Collard* v. *Armstrong* (6); *Gibson* v. *Rabey* (7); *Tetz* v. *Tetz* (8); and *Bilinski* v. *Kowbell.* (9)] It is submitted that the foregoing authorities establish the propositions enumerated in opening.

With regard to the construction of the Seduction Act, where the common law basis on which this legislation has developed is an action of the character of damage, then it is reasonable to interpret s. 5 as requiring proof of damage. Further, some assistance in the construction of s. 5 is derived from s. 4 of the Act, because although s. 5 creates a new tort, it is connected with the old law, and by s. 4 the Legislature clearly show that what they had in mind was the seduction of a woman which had resulted in pregnancy and childbirth. Having regard to the provisions of ss. 4 and 5, and to the very wide door that would be opened by the construction of seduction under s. 5 as independent of any disability from service, a restricted meaning ought to be given to that section so as to make it cover only cases where pregnancy and childbirth, or inability to serve, have been caused.

The respondent was not represented.

June 4. The judgment of their Lordships was delivered by LORD THANKERTON. This appeal comes by special leave, granted on July 1, 1937, from a judgment of the Supreme Court of Canada. By a majority of four judges to one, the Supreme Court allowed the respondent's appeal from a judgment of the Supreme Court of Alberta (Appellate Division) dismissing her appeal from the judgment of Ives J., dated July 2, 1934. The respondent and her father brought an action against the appellant under the Seduction Act, c. 102 of the Revised Statutes of Alberta, 1922, in which they severally claimed damages for the seduction of the respondent. The jury found in favour of both plaintiffs, awarding the respondent $10,000 damages, and her father $5000. Ives J., the trial judge, expressed disagreement with the verdict of the jury, and subsequently, notwithstanding the verdict, gave judgment dismissing the action with costs, on the construction of the statute. He was of opinion that damage in the nature of loss of service, or, at least, of interference with the woman's ability to serve, is the gist of the action for seduction, and that there is nothing in the statute to convey a contrary intendment. In the absence of any evidence of the birth of a child or of pregnancy, he thought the seduction of the respondent in no way interfered with her ability to serve.

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(1) 2 C. & P. 303.
(2) (1845) 13 M. & W. 738.
(3) [1937] 1 K. B. 527, 533.
(4) (1850) 7 U. C., Q. B. 146.
(5) (1865) U. C., E. & A. 525.
(6) (1913) 6 A. L. R. 187, 188.
(7) (1916) 9 A. L. R. 409, 411, 414.
(8) (1922) 18 A. L. R. 364.
(9) (1931) 2 W. W. R. 245, 247.

Both the respondent and her father appealed. The Supreme Court of Alberta (Appellate Division) unanimously dismissed the father's appeal, and he has not appealed from that decision. The respondent's appeal was dismissed by a majority of three judges to two. Harvey C.J.A., who thought that Ives J. had misdirected the jury, and that for other reasons the appellant had not had a fair trial, was further in favour of dismissing the respondent's appeal substantially for the reasons given by Ives J.

Two other judges of the Appellate Division, Mitchell J.A. and Ford J.A., agreed with the Chief Justice. Clarke J.A. and Lunney J.A. took a different view on the construction of the Seduction Act, and would have allowed the respondent's appeal. The respondent then went to the Supreme Court of Canada, where her appeal was allowed. Sir Lyman Duff C.J. was of opinion that damage actually, or presumptively, entailing some loss of service or some disability for service, is not of the gist of the action under s. 5 of the Seduction Act, which gives an unmarried female a right of action in her own name for seduction. The Chief Justice had no doubt that there was sufficient evidence of damage to support the action. In dealing with the submission of the appellant's counsel that the verdict of the jury was against the weight of evidence, the Chief Justice said that it had not been established by argument that the verdict of the jury on the evidence was one which no jury acting judicially could give. Rinfret and Kerwin JJ.

agreed with Sir Lyman Duff C.J., and Hudson J. concurred in the result. Davis J. dissented. He was of opinion that all the provisions of the Seduction Act, including s. 5, imputed as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of. Without expressing any opinion as to whether the jury was justified in arriving at its verdict of guilty against the appellant on the evidence, Davis J. thought the evidence disclosed no cause of action, and that the action should be dismissed.

In presenting the case for the appellant, Mr. Gahan invited their Lordships to review the evidence and the summing up by the trial judge, with a view to disturbing the verdict of the jury. Their Lordships were not disposed to take this course. They have no doubt that, when special leave to appeal was granted, there was no intention on the part of their Lordships who heard the application to permit argument on any point except the effect of s. 5 of the Seduction Act. The only question, therefore, which was argued before this Board was the construction of the statute. The respondent was not represented, but their Lordships have had the advantage of a full and careful argument by Mr. Gahan on behalf of the appellant.

The Seduction Act of 1922 provides as follows :—

"Short Title.

"1. This Act may be cited as 'The Seduction Act.'

"Persons Entitled to Maintain Action.

"2. The father or, in case of his death, the mother (whether "she remains a widow or remarries) of any unmarried female "who has been seduced and for whose seduction the father or "mother could maintain an action in case such unmarried "female was at the time dwelling under his or her protection "may maintain an action for the seduction, notwithstanding "such unmarried female was at the time of her seduction "serving or residing with another person upon hire or other-"wise. ((1903) (2.), c. 8, s. 1.)

"3. Upon the trial of an action for seduction brought by "the father or mother it shall not be necessary to prove any

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"act of service performed by the party seduced but the same "shall in all cases be presumed and no evidence shall be "received to the contrary; but in case the father or mother "of the female seduced had before the seduction abandoned "her and refused to provide for and retain her as an inmate "then any other person who might at common law have "maintained an action for the seduction may maintain such "action. ((1903) (2.), c. 8, s. 2.)

"4. Any person other than the father or mother who by "reason of the relation of master or otherwise would have "been entitled at common law to maintain an action for the "seduction of an unmarried female may still maintain such "action if the father or mother is not resident in Alberta at "the time of the birth of the child which is born in consequence "of the seduction or being resident therein does not bring an "action for the seduction within six months from the birth "of the child. ((1903) (2.), c. 8, s. 3.)

"5. Notwithstanding anything in this Act an action for "seduction may be maintained by any unmarried female who "has been seduced, in her own name, in the same manner as "an action for any other tort and in any such action she shall "be entitled to such damages as may be awarded." ((1903) (2.), c. 8, s. 4.)

These provisions were first enacted as c. 8 of the Ordinances of the North-West Territories, 1903, ss. 2, 3 and 4, having been then adopted from legislation in Upper Canada dating from 1837 (7 Will. 4, c. 8) with the addition of s. 5.

If the language of s. 5 of the Act is read in its natural and ordinary meaning, and apart from other considerations, an intention to give an unmarried female who has been seduced a right of action in her own name for damages plainly appears. Seduction may well have been thought to be a wrong to the woman from whatever angle it was considered, though there are no doubt cogent reasons for great caution in giving her a remedy for what may be said to be no more than a voluntary loss of chastity.

It is said, however, on behalf of the appellant, that the section must be read as one of a group of sections all of which are dealing only with an action of seduction of the same nature as the action for seduction known to English law. An obvious objection at once suggests itself. The cause of action in the English law is the loss of service suffered by the plaintiff and, though so little proof of the relations of master and servant as scarcely to amount to more than a fiction will suffice to found the action, the action must fail if there be not some evidence. Proof of seduction is an incident rather than the essence of the action. All this was pointed out by Harvey C.J.A. in the course of his elaborate discussion of the English authorities. If, on the other hand, the woman is to have her own action for her seduction, it is inapposite to speak of loss of service, and it has apparently been supposed in some cases in the Provincial Courts of Canada that proof of loss of ability to serve takes the place of proof of loss of service as the real ground of the action when brought by the woman herself. Such a modification of the cause of action per quod servitium amisit seems to their Lordships, with all respect to the learned judges who have approved this reasoning, to be unsatisfactory. The action for seduction as known to English law has itself had an unsatisfactory development, as may be seen from the case of *Norton* v. *Jason* (1), to which their Lordships were referred. This was an action on the case for entering the house of the plaintiff and making an assault on his daughter and getting a bastard by her. Roll C.J., in ordering the case to be set down for argument, said that the action was brought for the damage done to the master and he might have an action for the damage caused to him by the battery and, although the daughter could not have an action, her father might, although not for entering his house, because it was with his leave, nor for assaulting his daughter and getting her with child, because this was a wrong particularly done to her, yet for the loss of her service caused by this he might have an action. In the case of *Eager & Grimwood* (2) the declaration was framed in trespass, thus avoiding the necessity for proving the loss of service. The action failed notwithstanding the argument of counsel for the plaintiff that the debauching of

(1) (1653) Style 398; 82 E. R. 809.

(2) (1847) 1 Ex. 61.

the plaintiff's servant, who was his daughter, was an act of trespass and an invasion of the legal right of the plaintiff, who had a kind of property in her. The decision of Tindal C.J. in *Grinnell* v. *Wells* (1) was said by Pollock C.B. to be precisely in point, where Tindal C.J. said (2): "The foundation of the "action by a father to recover damages against the wrongdoer "for the seduction of his daughter, has been uniformly placed, "from the earliest time hitherto, not upon the seduction itself, "which is the wrongful act of the defendant, but upon the "loss of service of the daughter, in which service he is supposed "to have a legal right or interest."

As has been repeatedly said, this is little more than a fiction, and it had the result noticed in the comment appended to the report of the judgment of Tindal C.J., and attributed to Serjeant Manning (3): "It may be observed, however, "that the quasi fiction of servitium amisit affords protection "to the rich man, whose daughter occasionally makes his tea, "but leaves without redress the poor man, whose child, as "here, is sent, unprotected, to earn her bread amongst "strangers."

It may be also observed that it leaves without redress the child herself. Their Lordships see no reason based upon the language of s. 5 for supposing that the Legislature did not intend to close the gap and give the unmarried female redress. It was contended that the words which stand at the head of the group of ss. 2, 3, 4 and 5 of the Act, namely, "Persons "entitled to maintain action," support the construction contended for by the appellant's counsel. Their Lordships were also invited to say that light is thrown upon the proper interpretation of s. 5 by s. 4, which gives a right of action to a person other than the father or mother, in circumstances in which the birth of a child in consequence of the seduction is predicated. These contentions do not commend themselves to their Lordships. It appears to them that the Legislature intended to give a new right of action "in the same manner as "an action for any other tort" to an unmarried female who

(1) (1844) 7 Man. & G. 1033.
(2) Ibid. 1041.
(3) Ibid. 1044.

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has been seduced. Their Lordships agree with the view stated in the judgment of Sir Lyman Duff C.J., and adopted by him, that the action under s. 5 has nothing to do with the parental relations, nothing to do with the relation of master and servant, and nothing to do with loss of service or service, and that there is no a priori probability that s. 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy, or illness, directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in s. 5. Having regard to the construction which their Lordships place upon s. 5, a construction which seems to them to be the natural and reasonable meaning of the language used, it is unnecessary to examine the numerous authorities in England and in Canada with regard to the action for seduction at common law.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The respondent did not lodge a printed case and was not represented at the hearing. An appearance was, however, entered on her behalf, and such costs as she is entitled to must be paid by the appellant.

Solicitors for appellant: *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* UNITED STEEL COMPANIES, LIMITED . APPELLANTS ;

AND

CULLINGTON (INSPECTOR OF TAXES) . . . RESPONDENT.

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Feb. 19, 20 ; March 19.

Revenue—Companies—Amalgamation—Losses—Wear and tear allowances—Right to carry forward—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., rr.* 6, 11—*Finance Act,* 1926 (16 & 17 *Geo.* 5, *c.* 22), *ss.* 32, 33—*Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 153, 154.

The U. S. Co. was incorporated in 1930, its main object being to acquire the undertakings of and to amalgamate two steel companies on the terms of a scheme sanctioned by an order of Court under the Companies Act, 1929, ss. 153 and 154. The scheme was carried out and the undertakings and properties of the two component companies were vested in the U. S. Co. in return for shares, the two companies being dissolved.

The business of the two companies had been carried on at a loss for several years before the amalgamation and these businesses were afterwards carried on without interruption in the name of the U. S. Co. For the year 1936–37 the U. S. Co. claimed to set off against its assessment for income tax (*a*) the accumulated losses, and (*b*) wear and tear allowances of the two component companies for the years before the amalgamation, in accordance with r. 6 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, notwithstanding the new r. 11 of the same rules substituted by the Finance Act, 1926, s. 32, for the old rule :—

Held, (1.) that on the true construction of the new r. 11 the U. S. Co. must for the purpose of computing income tax be treated as having set up and commenced a new trade, and therefore that no deduction could be made from the profits or gains of the U. S. Co. in respect of the allowances for wear and tear of the two component companies ; (2.) that on the construction of s. 33 of the Finance Act, 1926, no deduction could be made from the profits or gains of the U. S. Co. in respect of losses of the two component companies ; and (3.) that it was impossible to construe s. 154 of the Companies Act, 1929, or the order made thereunder, as transferring the right to either of these deductions to the U. S. Co.

Opinion reserved by Lord Russell of Killowen and Lord Wright as to the correctness of the decision in *Donoghue* v. *Doncaster Amalgamated Collieries* [1939] 2 K. B. 578.

Decision of Court of Appeal [1939] 1 K. B. 644 affirmed.

* *Present :* VISCOUNT CALDECOTE L.C., VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

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United Steel Companies, Ld. *v.* Cullington.

Appeal from a decision of the Court of Appeal (1) varying a decision of Lawrence J. (2)

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 25, 1937, the United Steel Companies (hereinafter called " the company ") appealed against an assessment to income tax in the sum of 690,000*l.* less 175,000*l.* wear and tear for the year ending April 5, 1937. The assessment was made under Case I. of Sch. D of the Income Tax Act, 1918, in respect of the company's profits as steel manufacturers.

The company was incorporated under the Companies Act, 1929, on August 22, 1930, with a capital of 6,650,000*l.* divided into 6,650,000 ordinary shares of 1*l.* each. The primary object of the company was to acquire and amalgamate the undertakings and all or any of the properties, assets, rights, powers, debts, liabilities and duties of the United Steel Companies, Ld. (hereinafter called " the 1918 Steel Company "), and United Strip and Bar Mills, Ld. (hereinafter called " the "Strip Company "), on the terms of a scheme of arrangement and amalgamation dated June 20, 1930, which was sanctioned by an order of Court dated August 16, 1930, and made pursuant to the Companies Act, 1929, ss. 153 and 154.

The 1918 Steel Company was registered on March, 1918, and the Strip Company on February 14, 1920. Upon the formation of the company the properties, rights, and powers of every description, and all the debts, liabilities and duties of the two companies were without further act or deed transferred to and vested in the company.

On August 30, 1930 (the date of the incorporation of the company), there were issued and outstanding the shares and securities of the 1918 Steel Company and the Strip Company set out in the scheme. Shares of the company were duly issued to the holders of shares and securities of the 1918 Steel Company and the Strip Company in accordance with the scheme and order. The order provided for the delivery to the registrar of companies within seven days of the order of office copies of the order by the 1918 Steel Company and the

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(1) [1939] 1 K. B. 644.

(2) [1938] 2 K. B. 566.

Strip Company, and that at the expiration of three months from the date of delivery these two companies should be deemed to be dissolved. Copies of the order were duly delivered.

The businesses carried on by the 1918 Steel Company and the Strip Company were continued by the company from August 22, 1930, and the books of account of these companies were not closed on that date nor were statements of account rendered to their customers or suppliers on that date. Both manufacture and accounting were carried on during that day and subsequently in the name of the company, and the businesses which before that day had been carried on by those two companies were treated as from that date as branches of the company.

The Strip Company commenced trading on December 1, 1921, and the separate accounts (made up to June 30 in each year) showed annual losses from that date until June 30, 1931. Consequently effect could not be given to the deductions for wear and tear of plant to which the Strip Company was entitled under r. 6, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918.

The deductions for wear and tear of plant to which the Strip Company was so entitled but in respect of which relief could not be given for the years ending April 5, 1923–30, and for the period April 5, 1930, to August 22, 1930, amounted to 448,850*l.* The trading losses (as computed by the Rules applicable to Cases I. and II. of Sch. D and reduced to the extent that relief was given under s. 34 of the Act of 1918) of the business carried on by the Strip Company up to August 22, 1930, in respect of which relief could not be given to that company amounted to 44,091*l.*, and the losses of the 1918 Steel Company for which relief could not be given to that company amounted to 90,729*l.*, making in all a total sum of 134,820*l.* in respect of which the company claimed relief from the assessment under appeal.

On August 10, 1928, the 1918 Steel Company made with the Board of Inland Revenue an arrangement whereby the liabilities and claims of the 1918 Steel Company in respect of income tax, excess profits duty, and corporation profits tax subsisting as at April 5, 1927, were satisfied. Consequently the first year of assessment of the 1918 Steel Company that fell to be considered for the purpose of this case was the year ended April 5, 1928. The 1918 Steel Company's income from its trade for that year was computed by reference to that company's accounting year ended June 30, 1926. The profits and losses (as computed by the Rules applicable to Cases I. and II. of Sch. D to the Act of 1918) of the businesses carried on without interruption by the 1918 Steel Company and by the company did not give rise to a charge for tax for the years ended April 5, 1928, to 1936, either because there were no profits or because the profits were less than the deductions to which the company was entitled under r. 6, sub-r. 1, of the said rules in respect of wear and tear of plant and machinery.

The company claimed that in the circumstances it was entitled to set off against its own profits all the allowances for wear and tear carried forward which the 1918 Steel Company and the Strip Company would have been entitled to carry forward against future profits if they had continued to carry on trade.

It was contended on behalf of the company :—

(*a*) by virtue of the order of the Court dated August 16, 1930, the rights as well as the property of the Strip Company and the 1918 Steel Company were vested in the company without further act or deed ;

(*b*) the rights conferred by r. 6 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, and by the Finance Act, 1926, s. 33, were among the rights vested in the company ;

(*c*) in accordance with the said order the businesses carried on by the 1918 Steel Company and the Strip Company respectively were not discontinued, but were continued without interruption in the name of the company, which did not set up a new trade or business ;

(*d*) in these circumstances r. 11 of the Rules applicable to Cases I. and II. of Sch. D (as amended by s. 32 of the

Finance Act, 1926) was not applicable, and its application would be inconsistent with the intention of the Companies Act, 1929, ss. 153, 154, and of the order of the Court made in pursuance of these sections;

(*e*) the liability of the company for income tax for all years should be computed throughout by reference to the profits and losses of the year preceding the year of assessment with the right to set off against the assessment for 1936–37 any losses and wear and tear allowances which became available by that method of computation, whether such losses and allowances arose from the 1918 Steel Company, from the Strip Company, or from the company.

On behalf of the Crown it was contended (inter alia):—

(*a*) that the company on August 22, 1930, succeeded to the trades of the 1918 Steel Company and the Strip Company within the meaning of the new r. 11, sub-r. 2, substituted by the Finance Act, 1926, s. 32;

(*b*) the company therefore fell to be assessed as if a new trade had been set up or commenced on August 22, 1930;

(*c*) the company was not entitled to set off against its own profits the allowances for wear and tear and losses in respect of which relief could not be given to the 1918 Steel Company and the Strip Company at the date of the incorporation of the company;

(*d*) the reliefs to which the company was entitled under the Income Tax Acts were in no way affected by the terms of the order or the Companies Act, 1929.

The Commissioners held that the company was not entitled to the wear and tear allowances or in respect of losses to which the 1918 Steel Company and the Strip Company were entitled at the date when the company was incorporated.

On appeal, Lawrence J. held that the company was entitled to deduct the allowances for wear and tear but not for losses in respect of the two companies during the years before the amalgamation. On appeal, the Court of Appeal held that the company was not entitled to any deduction for wear and tear or in respect of losses, and, further, that it was impossible to construe s. 154 of the Companies Act, 1929, or the order made thereunder as transferring the right to either of these deductions to the company.

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The company appealed to this House.

Raymond Needham K.C., *Gordon Brown* and *J. S. Scrimgeour* for the appellants. The amendment made in the old r. 11 has merely altered the basic years which are to be used in considering the assessment. What is fundamental is that the trade shall be the same trade, and that is satisfied in this case. The decision of the Court of Session in *Scottish Shire Line, Ld.* v. *Lethem* (1) supports the view for which we contend. In that case it was held that the successor company was entitled to the deduction for wear and tear to which the old company would have been entitled. The new rule is to be construed in the same way as the old rule. In effect there is a projection of the old company into the new, and as all the liabilities of the old company are to be discharged by the new, the latter should be entitled to claim in respect of the losses of the old. Sect. 154 of the Companies Act, 1925, identifies the new company with the old which it incorporates: *Donoghue* v. *Doncaster Amalgamated Collieries, Ld.* (2)

Sir Terence O'Connor S.-G. and *Reginald P. Hills* for the Crown were not called upon.

The House took time for consideration.

1940. March 19. Viscount Caldecote L.C. My Lords, the appellant company was formed on August 22, 1930. Its primary object was the acquisition on the terms of a scheme of arrangement or amalgamation sanctioned by the High Court of Justice, of the undertakings of two companies, which I will call respectively the Steel Company and the Strip Company. The businesses of these two companies were continued by the appellant company as from August 22, 1930, the businesses formerly carried on by the two companies being thereafter treated as branches of the appellant company. The Steel Company at the date of its acquisition by the

(1) 1912 S. C. 1108; 6 Tax Cas. 91.

(2) [1939] 2 K. B. 578.

appellant company had in its books a sum representing trading losses of the Steel Company, in respect of which relief under s. 33 of the Finance Act, 1926, had not been given. The Strip Company had a similar item in its books in respect of which relief had not been given. In addition to this item, the Strip Company was entitled to a deduction for wear and tear of plant, but it had not been possible, owning to the losses incurred by that company, to give effect to this deduction. The appellant company claimed the right to set off these three sums against its own profits.

The Special Commissioners found that the appellant company succeeded to the trades of the Steel Company and the Strip Company and falls to be assessed as if a new trade had been set up or commenced. They accordingly held that the appellant company was not entitled to the deductions claimed. Lawrence J. differed from the Special Commissioners as to the wear and tear claim, but otherwise upheld their decision. The Court of Appeal reversed Lawrence J. as to the wear and tear item and decided against the contentions of the appellant company on all points.

My Lords, the deductions claimed are by way of relief from the liability to pay income tax upon profits or gains, and the taxpayer must establish his claim upon a correct interpretation of the language of the material enactments.

The claim to deduct the wear and tear allowance of the Strip Company from the profits of the appellant company derives from r. 6 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, but the decision ultimately depends on the effect to be given to r. 11 enacted by s. 32 of the Finance Act, 1926. Before the passing of that Act, r. 11 of the Rules applicable to Cases I. and II. of Sch. D, which in its turn replaced the fourth rule of Sch. D as enacted in the Income Tax Act, 1842, provided that the tax payable by a person succeeding to a trade should be computed according to the profits or gains of the trade during the respective periods prescribed by the Act notwithstanding the succession, unless the person succeeding to the trade proved that the profits or gains had fallen or would fall short from

Viscount Caldecote.

some specific cause since the succession took place. If that were the material enactment for your Lordships' consideration, the appellant company would clearly be entitled to a deduction of the wear and tear allowance from its profits. The alteration effected by s. 32 of the Finance Act, 1926, was substantial. Para. 1 of the new r. 11 thereby enacted dealt with changes in a partnership, while para. 2 dealt with successions to a trade. The difference in the treatment is remarkable. In the first case the computation of tax is to be made, notwithstanding the change in the partnership, according to the profits or gains of the trade during the periods prescribed by the Income Tax Acts. In the second case the tax payable by the person succeeding is to be computed as if he had set up or commenced the trade at the time he succeeded, and the tax payable by the person carrying on the trade until that time is to be computed as if the trade had then been discontinued. This direction on the face of it seems to me to conclude this question in favour of the Crown. For if the tax payable by the appellant company as successor to the trades of the two former companies is to be computed as if the company commenced to trade when it succeeded, it would seem impossible to make a deduction in respect of allowances arising in years of assessment before that in which it must be taken that the new trade was set up or commenced.

It was, however, strenuously argued on behalf of the appellant company that r. 11 introduced by s. 32 of the Finance Act, 1926, did not relate to the method of computation of profits, but merely altered the basic year of assessment in cases where there was a succession to a trade. I confess I had some difficulty in following the argument. In computing the tax payable upon the profits or gains of the trade, part of the process is the deduction of any allowances permitted by the income tax provisions. As long as the profits and gains under Sch. D were computed on the basis of an average of three years, the deduction was made from the figure resulting from the taking of the average, and the balance was the amount of the profits and gains on which tax was charged. When the profits or gains of the year preceding the year of assessment were substituted for the average of the three preceding years, the process was the same so far as a deduction for wear and tear was concerned. The words of the new r. 11 enacted by s. 32 of the Finance Act, 1926, seem to me imperative and clear, and I see no reason for not giving them their natural meaning.

A further contention which can be dealt with more briefly was made with regard both to the claim in respect of wear and tear and to the claim in respect of losses. Originally the appellant company claimed, so far as losses were concerned, to be within s. 33 of the Finance Act, 1926, apart from the effect of the order of Eve J. That argument was abandoned in the Court of Appeal and it is now admitted that the relief which s. 33 gives is purely personal to the person sustaining the loss. The claim in respect of losses, therefore, rests solely on the sections of the Companies Act and the order of Eve J. The contention now advanced is that the effect of s. 154 and of the order of Eve J. transferring the undertakings of the two companies and of their properties was to transfer the right to deductions to the newly formed appellant company. This, in my opinion, requires an impossible construction of s. 154 of the Companies Act and of the order of Eve J.

On both points I agree with the judgment of Finlay L.J. in delivering the judgment of the Court of Appeal, and I think this appeal should be dismissed with costs.

Viscount Maugham. My Lords, as appears from the special case, the main questions are whether the appellants, a new company amalgamated under ss. 153 and 154 of the Companies Act, 1928, is entitled to deduct wear and tear allowances and losses incurred by the constituent companies for the years before the amalgamation.

The appellants acquired their business and undertaking on August 22, 1930, under a scheme of arrangement sanctioned by the Court pursuant to ss. 153 and 154 of the Companies Act. The two transferor companies were the old United Steel Companies, Ld., and the United Strip and Bar Mills, Ld., whom I shall refer to as the 1918 Steel Company and the

Strip Company. These companies had not been successful. They had made large losses in respect of which relief could not be obtained under s. 34 of the Income Tax Act, 1918. The Strip Company had also been unable to make the deductions in respect of wear and tear to machinery which it was entitled to make under the provisions of r. 6 of the Rules applicable to Cases I. and II., Sch. D, of the Income Tax Act, 1918 (a rule which I shall refer to as r. 6). The appellants' claim is to carry forward and set off against their own profits the losses incurred by the 1918 Steel Company and the Strip Company before the amalgamation, and also to deduct from their profits the unapplied balances of the wear and tear allowances of the Strip Company. The Court of Appeal have decided both these questions in favour of the Crown, varying an order of Lawrence J. who was in favour of the taxpayer with regard to the allowance for wear and tear.

There was a further point suggested, namely, that the appellants were entitled to succeed by virtue of ss. 153 and 154 of the Companies Act, 1929, a contention which was described by the Court of Appeal as somewhat startling.

My Lords, I am content with the judgment of the Court of Appeal on all points, and shall trouble your Lordships only with a few observations relative to the claim as regard the wear and tear allowance under r. 6.

I will begin by observing that the right under r. 6 is not a chose in action or an asset of the taxpayer, and that it could not be assigned to the appellants. It relates only to deductions allowable to a taxpayer in charging the profits or gains of a trade as representing the diminished value by reason of wear and tear of machinery or plant used in the trade by and belonging to the taxpayer. Sub-r. 3 of r. 6 allows the deduction to be added by the taxpayer to the amount of the deduction in a subsequent year if there has not been a previous opportunity of making the deduction out of profits. It is clear that if the trader goes out of business this right to carry forward a deduction is lost, unless indeed there is a statutory right given to some other trader, presumably a successor, to deduct the diminished value (by wear and tear) of machinery and plant used by the predecessor from the profits or gains of the successor. It will be remarked that the machinery and plant might have been placed on the scrap-heap, or perhaps acquired by the successor for a very small sum. It is a little difficult to see the reason in such a case for giving to the successor the right claimed. But there is always a possibility of finding in the twists and turns of the income tax maze some relief or refuge for the harassed taxpayer, and this possibility we must now examine.

My Lords, I agree with the opinion expressed by the Court of Appeal that the point turns upon the proper construction of r. 11, introduced in substitution for an older rule by s. 32 of the Finance Act, 1926. The new rule now must be treated as r. 11 of the Rules applicable to Cases I. and II. of Sch. D. We were urged to regard this rule in relation to its history (which is fully stated in the judgment under appeal) and to its context as one of a number of rules into which it was introduced.

I have carefully borne this precept in mind; but I am nevertheless of opinion that the true construction and effect of the rule are reasonably clear. There are two parts to the rule. Reading it shortly, the first sub-rule deals with partnerships and provides that if a change in the partners has occurred in any way, one or more partners continuing to be engaged in the business, the tax payable by the continuing partners or partner shall notwithstanding the change be computed according to the profits or gains of the trade during the period prescribed by the Income Tax Acts.

There is an important proviso to the sub-rule which gives the continuing partners a right by a signed notice to the surveyor to require " that the tax payable for all years of "assessment shall be computed as if the trade, profession or "vocation had been discontinued at the date of the change "and a new trade, profession or vocation had been then set "up or commenced and that the tax so computed for any "year shall be charged on and paid by such of them as would "have been charged if such discontinuance and setting up "or commencement had actually taken place." If such notice is given "the tax shall be computed, charged, collected "and paid accordingly."

Sub-r. 2 applies to the case of any person (which includes a company) succeeding to any trade previously carried on by another person, and it provides that the tax payable for all years of assessment by the new owner "shall be computed "as if he had set up or commenced the trade, profession or "vocation at that time, and the tax payable for all years "of assessment by the person who until that time carried on "the trade, profession or vocation shall be computed as if it "had then been discontinued."

My Lords, I am clearly of opinion that if the proviso to sub-r. 1 is brought into operation by an appropriate notice the new partners cannot obtain the benefit of allowances or deductions available prior to the new trade being commenced. It will be noted that the proviso specifies in some detail the notice which must be given and such notice itself states the consequences, namely, that the tax is to be computed for any year and also charged and paid as if there were a *new* trade, profession or vocation. It is stated in the judgment under appeal that counsel for the present appellants did not dispute the view of the proviso which I have above stated. This admission was not made before your Lordships, but I heard no argument which led to the belief that the admission was not rendered necessary by the language of the proviso.

If we turn to the second part of r. 11, which deals with succession to trade by a stranger, the language seem to me almost equally clear. The words "at that time" and "as if "it had then been discontinued" are strong to suggest that the tax payable is to be computed for all purposes as if there were a *new* trade, profession or vocation. To my mind it is at any rate clear that there is no possibility of reading into the rule, or any other existing rule to which we were referred, a right to exercise the remarkable privilege contended for, namely, of deducting from profits made after a previous business has been discontinued the diminished value of plant and machinery which the successor has perhaps never acquired.

For these reasons and for those given by the Court of Appeal, I agree that this appeal must be dismissed.

Lord Russell of Killowen (read by Lord Romer). My Lords, the claim of the appellants to be entitled to set off against their own profits, allowances for wear and tear which the old companies would have been entitled to carry forward against future profits, if they had continued to trade, is a claim which in my opinion could only be acceded to by completely ignoring and proceeding in the teeth of the provisions of the second paragraph of r. 11 of the Rules applicable to Cases I. and II. of Sch. D.

It was contended that r. 11 did not relate to the manner in which the profits of any year were to be computed, but merely prescribed, in the case of a change in the ownership of a trade, the period the profits of which were to be the measure of assessment for the year of assessment. In my opinion the new rule introduced by s. 32 of the Finance Act, 1926, goes far beyond that. Under the former r. 11, as under the Income Tax Act, 1842, the cases of changes in the ownership of a trade within the year of assessment, or within what may be called the basic period, were all treated on the same footing, whether there was any continuity of ownership or not; i.e., irrespective of the question whether anyone who was an owner before the change was also an owner after the change. By the new r. 11 a sharp distinction is drawn between the two cases: para. 1 deals with the cases where continuity of ownership exists; para. 2 deals with the cases where there is a complete break in the ownership of the trade. In the first case the tax payable by the new owners is computed according to the profits earned during the basic period, i.e., earned by the then owners of the trade. The proviso, however, gives an option if all the owners (old and new) wish it, of dealing with the matter on the footing of the trade having been discontinued and a new trade set up at the date of the change. Para. 2 of r. 11, however, prescribes only one method of computing the tax payable. It postulates that one person has succeeded to a trade " which until that "time was carried on by another person," i.e., it postulates a complete break in the ownership. In such a case it provides that the tax payable by the new owner shall be computed as if he had set up the trade when he became owner, and that the tax payable by the old owner shall be computed as if the trade had then been discontinued. In the face of that provision it is impossible to hold that the new owner (whose business is to be treated, for the purpose of computing the tax payable by him, as a brand new business) can have any claim to allowances, in virtue of allowances for wear and tear carried forward by the old owner.

The judgment of Lawrence J. on this part of the case is largely, if not entirely, based on a contrast of the wording of the proviso to para. 1 with the wording of para. 2 of r. 11; emphasis being laid upon the words "new trade" in the proviso, and the fact that the trade of the new owner in para. 2 is not described as a "new" trade. But if it once be appreciated that the proviso is dealing with cases in which there is some continuity of ownership, and that para. 2 is dealing with cases in which there is a complete break in ownership, the reason for the difference of wording becomes apparent, and the point disappears. In the proviso it was necessary specifically to require the trade to be treated as if it were a new trade, because the existence of continuing owners might well have prevented it from being considered to be or being treated as a new trade. In the case of a complete break of ownership, the trade in the hands of the new owner, if treated as then set up for the first time, must necessarily be treated as a new trade, and need not be so described.

It was, however, argued that even if the true construction of r. 11 operated adversely to the contention of the appellants, they were nevertheless entitled to succeed in their claim and were entitled to exercise the rights which the old companies would have had, had they continued to trade; and this by reason of the order of Eve J. made under s. 154 of the Companies Act, 1929. My Lords, I find a difficulty in discovering in that section any indication that property which the transferor company could not itself have transferred to the transferee company may nevertheless be transferred to that company by the order of the Court. It is, however, unnecessary to decide this point, because of the particular right here in question. I desire, however, to reserve for future consideration the question whether the case of *Donoghue* v. *Doncaster Amalgamated Collieries* (1) was rightly decided.

The right here claimed is not only personal to the old companies, but is a right which can only be asserted in relation to income tax payable by them respectively in respect of the profits of the trades carried on by them respectively: and even assuming that the order of Eve J. operated to vest that right in the appellants, it does not become in transitu a right exercisable in regard to income tax payable by the appellants in respect of the profits of the trade carried on by the appellants.

There remains the claim for allowances in respect of losses carried forward by the old companies. This was rested solely upon the order of Eve J. and s. 154 of the Companies Act, 1918, and must fail with the other claim.

For these reasons I would dismiss the appeal.

LORD WRIGHT. My Lords, the main argument of the appellants was as to the true construction of r. 11, sub-r. 2, enacted by s. 32 of the Finance Act, 1926. The words are in my opinion quite plain. In the most unequivocal language they sharply divide the trade carried on by the person succeeding, from the trade up to the time of the succession carried on by the person to whom the former succeeded. The tax on the former is to be computed as if he had set up or commenced the trade, at the time when he succeeded. The tax on the latter is to be computed on the footing that the trade carried on by him up to the succession had been then discontinued. I cannot better express my reasons for rejecting the appellants' contention than by quoting the words of Finlay L.J. in delivering the judgment of the Court of Appeal (2): "The direction to compute the tax payable can

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(1) [1939] 2 K. B. 578. (2) [1939] 1 K. B. 660.

"only mean that the tax payable has to be ascertained after "making all proper allowances on the basis that the trade "was set up or commenced on the last mentioned date. This "must of necessity exclude any allowances to which the "predecessor might be entitled in respect of the period "antecedent to the acquisition of the trade by the successor." I cannot accept the contention on behalf of the appellants that r. 11, sub-r. 2, when it speaks of the computation of the tax is merely concerned with the change in the period of assessment. My view is, I think, fatal to the claim for allowances for wear and tear and a fortiori to the claim for losses under s. 33.

But it was sought to support both claims by relying on s. 154 of the Companies Act, 1929, and the order of Eve J. made under that Act confirming the deeds of arrangement and amalgamation of the two old companies with the appellant company. The order transferred, so it was contended, to the appellant company the right to the allowances claimed because, it was said, they were included in the terms of the order in that it transferred to the appellant company the properties, rights and powers of every description of the old company. It is I think a sufficient answer to this argument that the old companies never had any right to these allowances. I question whether the claim to an allowance under r. 6 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, can properly come under the description of a property, right or power. But in any case the old companies never had any such right or property or power, however it is described, in respect of these allowances. All they had was a claim to allowances from their own profits in respect of wear and tear or losses. Neither company during its existence ever had profits or gains from which the deductions now claimed in whole or in part could have been made. The appellant company has been carrying on its own trade as from 1930 and it is in respect of the profits of that trade that the allowances are claimed. The old companies never had any interest in that trade. Their own trade ceased in 1930.

This I think is a sufficient answer. It would, however, have been a strange result if the Companies Act, 1929, had by a side wind amended in a substantial particular the Finance Act, 1926. To effect such an amendment express and apposite words would have been necessary.

The appellants relied, as supporting their construction of the Companies Act, 1929, on the decision in *Donoghue* v. *Doncaster Amalgamated Collieries.* (1) That was a decision of the Court of Appeal constituted by the same members as those who gave the judgment under appeal. The powers of s. 154 were there held to extend to dealing with a purely personal right, namely, a contract of employment. If it were material I should desire most carefully to consider what was there decided. But the reasons for which I reject the appellant company's contention are sufficient quite apart from any questions considered in *Donoghue.* (1) Indeed the members of the Court of Appeal when they gave their judgment in *Donoghue* (1) a few months after their judgment now under appeal, do not refer to the latter and do not seem to have felt that there was any conflict between their two judgments. I do not here consider it necessary to examine the decision in *Donoghue.* (1).

I concur in the motion proposed.

Lord Romer. My Lords, it must be conceded that were it not for the change in the law effected by s. 32 of the Finance Act, 1926, the appellants would have been entitled to deduct from their profits for the year ending April 5, 1937, the aggregate of the wear and tear allowances that had been made to the Strip Company up to August 22, 1930. For on this latter date the appellants succeeded to and continued thereafter to carry on the very same trade that up to then had been carried on by the Strip Company. The allowances would accordingly by reason of the provisions of sub-s. 3 of r. 6 of the Rules applicable to Cases I. and II. of Sch. D, Income Tax Act, 1918, be added to the amount of the deduction for wear and tear for the year of assessment in question and deemed to be part of that deduction. Rule 11 of those rules would

(1) [1939] 2 K. B. 578.

have had nothing to do with the matter. It was in the first place a rule that dealt only with changes and successions in the persons carrying on a continuous trade or profession occurring within the year of assessment or the period of average upon which the assessment had to be based. In the second place the rule was solely concerned with the basis on which the profits or gains of the trade or profession were to be computed where such a change had occurred, and was in no way concerned with what deductions could be made from those profits or gains in respect of allowances under r. 6. But the new r. 11 substituted for the old one by s. 32 of the Finance Act, 1926, is, so far at any rate as successions are concerned, in very different terms. It now deals with the tax payable for all years of assessment after the succession has taken place, and enacts (para. 2) that it shall be computed as if the successor had set up or commenced the trade, profession, or vocation at that time. The rule no longer seems merely to contemplate, as did the old one, a change in the ownership of a continuous trade, but seems to enact that tax shall be payable as though there had been a change in the trade itself. This was the construction put upon the rule by the Court of Appeal, and in my opinion it is the only possible construction. I am unable to attach any importance to the fact that in the proviso to para. 1 of the rule the word "new" occurs and that it does not occur in para. 2. If the successor is to be treated for income tax purposes as if he commenced the trade at the time of the succession, I am unable to see how the trade then commenced can for those purposes be regarded as being other than a new trade. This being so, it is obvious that there can be no deductions allowed in respect of the trade carried on before the succession took place. Such trade has for the purposes of taxation to be treated as though it were a different trade altogether from the trade being carried on by the appellants.

My Lords, as to the contention of the appellants based upon ss. 153 and 154 of the Companies Act and the order of Eve J. of August 16, 1930, a contention that relates to the losses incurred by the Steel Company and the Strip Company as well as to the wear and tear allowances of the latter company,

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the decisions of Lawrence J. and the Court of Appeal rejecting such contention appear to me to be plainly right. The effect of the order of Eve J. was that the appellants succeeded to the trades of the two companies within the meaning of r. 11, sub-r. 2; but there is nothing in the two sections that can possibly be regarded as excluding the appellant's succession from the operation of that rule. It is true that by virtue of the sections and the order the appellants succeeded to all the rights possessed by the two companies at the time of the succession, but they did not thereby obtain any right to deduct the losses and wear and tear allowances of the two companies from the profits they might subsequently earn by their own trading. For the two companies had not, and obviously could not have had, any such right themselves.

My Lords, I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

REUVEN SWATITZKY . . . . APPELLANT; J. C.*

AND 1940

GOVERNMENT OF PALESTINE . . . RESPONDENT. May 27.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Joinder of parties—" Statement of defence " by third party incorporating claim to ownership of land—Substantive judgment in favour of third party—Code of Civil Procedure, art. 117—*Construction.*

By art. 117 of the Code of Civil Procedure of Palestine (Hooper): "If during the hearing of an action between two parties a third "party submits a statement of claim stating that he is entitled "to be joined as a party to the action, and if on being summoned "to attend the Court he proves in the presence of the parties "that he is entitled to be so joined, his application shall be "accepted; provided that the issue of a decree shall not thereby "be delayed, if the action has reached the stage of judgment."

The plaintiffs in a suit against the appellant claimed (inter alia) to be restored to their rights as lessees from the respondent, the Government of Palestine, of certain land of which the appellant was in possession. The Government of Palestine was summoned as a third party and filed a " statement of defence " of third party " in which a claim was made that judgment should be given confirming the ownership of the Government to the land as per Tabu registration, and that the defendant (appellant) should be ordered not to interfere with the use of the land by the tenants (plaintiffs). A declaration having been made by the Court below that the Government was entitled to remain registered as owner of the lands in suit, the appellant contended that the Government, as a third party, was in the position of a defendant, and that the Court was not entitled to grant a substantive judgment in their favour:—

Held, that art. 117 of the Civil Procedure Code, which is made applicable to proceedings of the Land Court by s. 3 of the Lands Court Ordinance, 1921, is not limited to joinder as a defendant, and it clearly contemplates a statement of claim by the third party which can be upheld as against either or both of the parties to the suit. There is no reason for limiting it to a defence.

Judgment of the Supreme Court of Palestine affirmed.

APPEAL (No. 57 of 1938) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (September 26,

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* *Present:* LORD THANKERTON, LUXMOORE L.J., and SIR PHILIP MACDONELL.

1925), varying a judgment of the Land Court of Jaffa (March 4, 1925).

In 1922 the Local Council of Petah Tiqva brought an action in the Land Court, Jaffa, against the appellant, Reuven Swatitzky, as defendant, and against the Government of Palestine as third party, claiming—(*a*) to have its rights restored as a lawful lessee in respect of certain land of an area of 1895 dunams and 461·95 square pics, which was in the possession of the defendant, in the Jaffa District near the village of Petah Tiqva ; (*b*) an order on the Land Department of the Government of Palestine (the respondent) to prove its ownership of the land in dispute ; and (*c*) a judgment to the effect that the respondent was the owner of the land in dispute, and that the appellant had no right of ownership therein, and that therefore a contract mentioned in the statement of claim whereby the respondent purported to lease the land in dispute to the Colony of Petah Tiqva stood good, and the council was entitled to cultivate the land in accordance with the provisions of such contract.

The respondent filed a " statement of defence of third party," asking that judgment should be given confirming the ownership of the respondent of the land in dispute, and that the appellant be ordered not to interfere with the use of the land by the tenants.

The appellant, who did not file a written defence, claimed that he had been in possession of the land since 1909, and that he had acquired a prescriptive right which entitled him to a tapou title from the Government.

The facts appear fully from the judgment of the Judicial Committee.

The Supreme Court of Palestine (Corrie, Senior British Judge, Jarallah and Khaldi JJ.) varied the judgment of the Land Court of Jaffa, and limited it to a declaration that the Government was entitled to remain registered as owner of the lands in claim.

Hon. Denys Buckley for the appellant.

J. M. Gover K.C. and *Kenelm Preedy* for the respondent.

1940. May 27. The judgment of their Lordships was delivered by Lord Thankerton. This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated September 26, 1925, dismissing the appellant's appeal from a judgment of the Land Court of Jaffa, dated March 4, 1925, but varying the judgment of the Land Court, and limiting it to a declaration that the respondent is entitled to remain registered as owner of the lands in suit.

The lands in suit consist of an area of 1895 dunams and 461·95 square pics, called the "Bassa," situated in the Jaffa District, at or near the village of Petah Tiqva. The suit arose out of the making of a contract of lease, dated November 11, 1921, between the Chairman of the Land Commission of Palestine, on behalf of the Government of Palestine, and certain persons acting under a power of attorney from the inhabitants of the Colony of Petah Tiqva, under which the Government leased to the Colony the land in dispute for a term of fifty years, but under reservation of a portion of about 200 dunams of the said land, which portion might, at the option of the Government, be subsequently included in the land leased.

In the Land Registry Office of Jaffa Turkish Register the Government of Palestine has been registered as the owner of the land in suit as Mirie land ever since 1897, and the said lease was duly registered on May 29, 1922.

The appellant, who was in possession of the area, obstructed the delivery of possession by the Government to the Colony, and the Colony applied to the magistrate's court of Jaffa for dispossession of the appellant, but the magistrate, on December 25, 1922, held that the question of ownership was involved, which placed the matter outside his jurisdiction, and dismissed the application. Thereafter, a Local Council of Petah Tiqva was invested with juristic personality, and, as provided in the lease, the benefit of the lease was transferred to the council, which instituted the present suit in November or December, 1923, against the appellant as defendant. In their statement of claim, which is undated, the council "requests by virtue of the aforesaid Official Documents to "restore its rights as a lawful lessee in respect of this land, to "order the Land Department of the Government of Palestine "to prove its ownership on this land and after the Government "produces proof of ownership that the Court may issue a "judgment to the effect that the Government is the owner "of the land, that the defendant has no right of ownership "thereon, and that therefore the contract between the "Government and the plaintiff stands good, and the latter "is entitled to cultivate the land in accordance with the "provisions of the contract." The council also asked that the Government should be summoned as a third party. On being so summoned, the Government decided to appear, and on December 6, 1923, filed a " statement of defence of third "party," in which a claim was made that judgment be given confirming the ownership of the Government to the land as per Tabu registration, and that the defendant should be ordered not to interfere with the use of the land by the tenants.

The appellant did not file a written defence, but, while admitting that the land was originally pasture land owned by the State, he claimed that he had been in possession since 1909, with the exception of a period of less than two years during 1918–1920, when he had been deported, that he had brought a considerable part of it into cultivation, and that he had acquired by haq qarar or prescription a right which entitled him to a tapou title from the Government. It is clear that he did make an application for a tapou grant to the Ottoman Government in 1911, and there is evidence that it was recommended, but no such title was given. He bases his claim to prescriptive right on art. 78 or art. 103 of the Ottoman Land Code, according as the land is Mirie or Mevat land. He accordingly challenges the right of the Government to grant a lease to any third party.

But the appellant is faced with a preliminary difficulty by reason of his actings in connection with the lease which he challenges, and both Courts have held that he is precluded by his actings from any challenge of the lease. Their Lordships, after an admirable argument by counsel for the appellant, are also of opinion that he is so precluded. The evidence of these actings is contained in three documents.

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By an agreement, dated October 3, 1920, between the appellant and the Colony of Petah Tiqva, the appellant "agrees to support the application of the Colony of Petah "Tiqva to lease the bassa swamp lands for 99 years or such "other long term as the Government may grant, this support "being conditional on the sublease of 30 per cent. of the said "land being made by the Colony to Swatitzky, his heirs and "assigns, and sanctioned by the Government. The specific "area of the said 30 per cent. to be settled by the parties by "agreement and in default of agreement by arbitration." It is unnecessary to refer to the further provisions, except to add that the appellant was to get compensation from the Colony for reclamation and improvement of the bassa lands made by him from the year 1906 to the year 1918. The appellant admitted his signature and the validity of this agreement.

On October 8, 1921, the appellant, along with 240 other inhabitants of Petah Tiqva, signed a power of attorney in favour of five members of the committee of the Colony empowering them to negotiate in their names with the Government (inter alia) for the lease in question. While the appellant was doubtful as to his signature on this document, his pleader in the Supreme Court admitted his signature. It is also clear beyond dispute that the lands claimed by the appellant are included in the agreement and the lease.

The appellant sought to get some help from the third document, namely, an undated letter by the appellant to the Government (Exhibit 5), in which he objects to the application of the Colony for a lease, and claims a right to the land. It was suggested by the appellant's counsel that this is the letter, dated April 19, 1921, filed by his counsel as Exhibit 4 on October 27, 1924. If that be the true date, it follows that the appellant signed the power of attorney on a subsequent date. In any event, the letter must have been written prior to the grant of the lease on November 11, 1921.

In their judgment, dated March 4, 1925, the Land Court decided that the Colony of Petah Tiqva, never having been in possession, was not a proper party to the proceedings, and dealt with the case as between the Government as third party and the defendant (the appellant) only. While it is not of material importance in the present case, their Lordships desire to express some doubt as to the propriety of not retaining the plaintiffs as a party. Such a conclusion does not seem to be supported by the last part of art. 1637 of the Mejelle, to which the Land Court refers. It held that the appellant could not claim possession and haq qarar of the property owing to the fact that he and others applied in the years 1921 and 1922 for the lease of all the property from the Government, as shown by the agreement and the undated letter respectively, the validity of which was acknowledged by defendant himself. It further held that the evidence showed that he was but a tenant of the land, and therefore could not be entitled to the right of haq qarar. Accordingly, the Court ordered the appellant to refrain from interference with the land, with a reservation as to his claim for the 30 per cent. The Government had expressed its willingness to lease to him the 200 dunams reserved in the lease upon the same terms as had been agreed with the Colony.

On the appellant's appeal to the Supreme Court, the Court, by a judgment dated September 26, 1925, dismissed the appeal, and varied the judgment of the Land Court by limiting it to a declaration that the Government is entitled to remain registered as owner of the lands in claim.

The appellant maintained, in the first place, that the Government, as a third party, was in the position of a defendant, and that the Court was not entitled to grant a substantive judgment in their favour. In their Lordships' opinion, this contention is ill-founded, in view of s. 117 of the Civil Procedure Code of Palestine, which is made applicable to the proceedings of the Land Court by s. 3 of the Lands Court Ordinance, 1921. Sect. 117 is not limited to joinder as a defendant, and it clearly contemplates a statement of claim by the third party which can be upheld as against either or both of the parties to the suit. There is no reason for limiting it to a defence.

As already indicated, their Lordships agree with both

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the Courts below that the appellant is precluded from challenging the power of the Government to grant the lease to the Colony, the rights of which are now vested in the Local Council of Petah Tiqva. This conclusion may be based on either of two grounds: Under the agreement of October 3, 1920, any equitable claim that the appellant had to the lands in question became vested in the Colony, the appellant, in place thereof, becoming entitled to the consideration which he derived under the agreement; the Government, on notice of the agreement, was bound to refuse to grant to the appellant any right in the lands which would be inconsistent with the agreement, and the appellant's undated letter could not affect this position. Alternatively, it is equally clear that the appellant is precluded by the admission necessarily implicit in the power of attorney of the right of the Government to grant the lease to the Colony. The power of attorney was coupled with an interest, and the appellant was not entitled to revoke his part in it: per Lord Atkinson in *Frith* v. *Frith.* (1) His letter could not revoke it.

Accordingly, their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the Supreme Court should be affirmed. The appellant will pay the respondent's costs of this appeal.

Solicitors for appellant: *Alfred Kerstein & Co.*
Solicitors for respondent: *Burchells.*

(1) [1906] A. C. 254, 259.

[PRIVY COUNCIL.]

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W. R. MORAN PROPRIETARY, LIMITED APPELLANTS;

AND

DEPUTY COMMISSIONER OF TAXATION FOR NEW SOUTH WALES } RESPONDENT;

AND

ATTORNEY - GENERAL FOR NEW SOUTH WALES AND OTHERS . . } INTERVENERS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Constitution—Construction—Scheme to assist wheat growers —Cost met by Federal taxation on home consumed flour imposed equally in all States—State producing little wheat—Financial grant in substance refunding flour tax—Whether taxation discriminating between States—Grant of financial assistance—Scheme and legislation intra vires Commonwealth Parliament—Commonwealth of Australia Constitution Act, 1900 (63 & 64 *Vict. c.* 12), *s.* 51 (*ii.*); *s.* 96—*Flour Tax Relief Act, No.* 40 *of* 1938, *of Tasmania.*

In pursuance of a joint Commonwealth and State scheme to ensure to wheat growers in all the Australian States a "payable "price" for their produce, a number of Acts were passed by the Commonwealth Parliament imposing taxes on flour sold in Australia for home consumption so as to provide a fund available for the payment of moneys to wheat growers. Those Acts included the Flour Tax (Stocks) Act, No. 50 of 1938, which imposed a tax on flour in excess of 1000 lbs. held in stock on December 5, 1938, by any person other than the manufacturer of the flour; the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48 of 1938, which provided the machinery relating to the imposition, assessment and collection of the taxes imposed by the various Acts; and the Wheat Industry Assistance Act, No. 53 of 1938, which provided for a fund into which the taxes were to be paid, and out of which certain payments were to be made to the States of financial assistance for payment to wheat growers in accordance with State legislation. In the case of the State of Tasmania, however, where the quantity of wheat grown was relatively insignificant and wheat was imported, the taxes on flour were imposed by the Federal legislation at the same rate as in the other States, but it was agreed as part of the scheme, and was provided by s. 14 of the Wheat Industry Assistance Act, No. 53 of 1938, that a special grant should be made to Tasmania, not subject to any Federal statutory conditions, but intended to be applied by the Government of Tasmania in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them, and provision to give effect to that purpose was made by the Flour Tax Relief Act, No. 40 of 1938, of the State of Tasmania.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

The Commissioner of Taxation for New South Wales having claimed from the appellants, also of that State, 85*l*. 12*s*. for flour tax and additional tax alleged to be due under the provisions of the Flour Tax (Stocks) Act and the Flour Tax (Wheat Industry Assistance) Assessment Act, the appellants contended that the Acts were part of a scheme of taxation operating, and intended to operate, by way of discrimination between Tasmania and the other States, and that such Acts and taxes were contrary to the provisions of s. 51 (ii.) of the Commonwealth of Australia Constitution Act, 1900, which provide that the Commonwealth Parliament shall have power to make laws " with respect of " taxation, but so as not to discriminate between States or parts " of States," and were therefore ultra vires the Commonwealth Parliament and void.

Held, that there is nothing in s. 51 of the Constitution Act to prevent the Commonwealth Parliament under s. 96 of that Act, which empowers the Parliament of the Commonwealth to " grant " financial assistance to any State on such terms and conditions " as the Parliament thinks fit," from passing measures in concert with any State or States with a view to a fair distribution of the burden of the taxation proposed, provided always that, as in the present case, the Act imposing taxes does not itself discriminate in any way between States or parts of States, and that the Act granting pecuniary assistance to a particular State is in its purpose and substance unobjectionable. There was in this case no valid ground for suggesting that the sums payable to the Government of Tasmania pursuant to s. 14 of the Wheat Industry Assistance Act were not in the nature of genuine financial assistance to the State, paid for the purpose of equalizing the burden on the inhabitants of Tasmania of taxation which was being imposed on all the millers throughout the Commonwealth. The various Commonwealth Acts, and the State legislation passed in conjunction therewith, if considered together as part of an organic whole, contained nothing which was prohibited in the Constitution.

Sect. 51 (ii.) prohibits discrimination, but does not afford protection against inequality of burden as between the States in the incidence of taxation.

Judgment of the Full Court of the High Court of Australia, (1939) 61 C. L. R. 735, affirmed.

APPEAL (No. 16 of 1940), by special leave, from a judgment of the Full Court of the High Court of Australia (June 7, 1939).

In the action out of which this appeal arose, which was instituted in the District Court of the Metropolitan District, Sydney, the respondent, the Deputy Commissioner of Taxation for New South Wales, sought to recover on behalf of the Commonwealth of Australia from the appellants, W. R. Moran Proprietary, Ld., the sum of 85*l.* 12*s.* for flour tax and additional tax alleged to be due to the Commissioner of Taxation under the provisions of two Commonwealth Acts, entitled the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48 of 1938, and the Flour Tax (Stocks) Act, No. 50 of 1938. The appellants' ground of defence was that they were not indebted, as alleged, for the reason that the two Acts were invalid and ineffective as being ultra vires the Commonwealth Parliament. By order of Evatt J., dated February 13, 1939, the action, as it was one involving the interpretation of the Constitution of the Commonwealth, was removed to the High Court.

The two Acts, together with several other Acts, were passed to give effect to a scheme agreed between the Prime Minister of the Commonwealth and the Premiers of the six States, the object and purpose of which was to ensure to wheat growers in all the States a "payable price" for wheat; and to raise the necessary sum a tax was to be imposed upon flour sold in Australia for home consumption. The Premiers on behalf of the States undertook to co-operate in the scheme by passing Acts in the States fixing prices for flour sold for home consumption and providing for the distribution of the proceeds of the tax among wheat growers in proportion to the quantities of wheat respectively produced by them. In Tasmania, however, where the quantity of wheat grown was relatively insignificant, the result of the scheme would have been that while having to bear the excise duty on flour by paying an increased price for bread and other wheat products, the people of Tasmania would receive very little advantage from the distribution of the proceeds of the taxes which were being imposed on flour. That difficulty was by agreement met by a scheme to provide that the tax on flour was to be levied on flour consumed in Tasmania at the same rate as on flour consumed in the other

States, but provision was to be made for the relief of Tasmania as a State to an amount not greater than the tax on flour collected in Tasmania.

The whole scheme was carried out by six Commonwealth Acts and by certain State Acts. On December 2, 1938, the Commonwealth Parliament passed the following Acts: the Flour Tax Act, No. 49 of 1938, which imposed a tax on flour manufactured in Australia by any person, and on or after December 5, 1938, sold by him or used by him in the manufacture of goods other than flour; the Flour Tax (Stocks) Act, No. 50 of 1938, which imposed a tax on flour in excess of 1000 lbs. held in stock on December 5, 1938, by any person other than the manufacturer of the flour; the Flour Tax (Imports and Exports) Act, No. 51 of 1938, which imposed a tax on flour imported into Australia, and also a tax upon wheat exported from Australia; the Wheat Tax Act, No. 52 of 1938, which imposed a tax on wheat grown in Australia and sold to a wheat merchant; and the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48 of 1938, which provided the machinery relating to the imposition, assessment and collection of the above taxes. The tax was fixed upon the basis that 5*s*. 2*d*. per bushel of wheat on rail at Williamstown was a remunerative price. On the same date, December 2, 1938, the Commonwealth Parliament passed the Wheat Industry Assistance Act, No. 53 of 1938, which, by ss. 6 and 7, provided for payment out of the Wheat Industry Stabilisation Fund, created by s. 5, of certain payments to the States of financial assistance; and by s. 14, provision was made for special grants to the State of Tasmania in accordance with the scheme, the greater part of which was intended to be repaid to the millers who had paid the flour tax in Tasmania; and to effect that a Tasmanian Act, the Flour Tax Relief Act, 1938, was passed. It was contended by the appellants that the above Acts of the Commonwealth Parliament were "part "of a scheme of taxation operating and intended to operate "by way of discrimination between Tasmania and the other "States," and that such Acts and taxes were accordingly contrary to the provisions of s. 51 (ii.) of the Constitution, and were therefore ultra vires the Commonwealth Parliament and void.

The provisions of all the relevant legislation appear from the judgment of the Judicial Committee.

The Full Court of the High Court of Australia (Latham C.J., Rich, Starke and McTiernan JJ., Evatt J. dissenting) held (inter alia) that the Taxation Acts plainly did not discriminate between the States and therefore did not contravene s. 51 (ii.) of the Constitution, and they gave judgment for the appellant for the sum claimed. The appeal is reported at (1939) 61 C. L. R. 735.

1940. May 1, 2, 6, 7. *A. T. Miller K.C.* and *Wilfrid Hunt* for the appellants. The case involves a question of constitutional importance arising on the construction of s. 51 (ii.) of the Commonwealth of Australia Constitution Act, 1900, which provides that "The Parliament shall, subject to this Constitu-"tion, have power to make laws for the peace, order, and good "government of the Commonwealth with respect to :— . . . . "(ii.) Taxation ; but so as not to discriminate between States "or parts of States ;" and the short point is whether there is in the Federal legislation in question, the Flour Tax (Stocks) Act, No. 50 of 1938, the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48 of 1938, and the Wheat Industry Assistance Act, No. 53 of 1938, a discrimination between the State of Tasmania and the other States affected by the flour taxes. The primary objection of the appellants is that there is a scheme of legislation which does effect such discrimination. Sect. 96 of the Constitution Act, which provides that the Commonwealth Parliament "may grant financial assistance to "any State on such terms and conditions as the Parliament "thinks fit," gives another power to be exercised in conjunction with, and subject to, the necessary effect of any limitations otherwise contained in the Constitution. The Acts taxing flour in this case are obviously all part of one scheme, and together form a scheme of taxation. In Tasmania, where there are very few wheat growers and wheat is imported, the scheme would have involved the inhabitants in bearing the burden without sharing the benefit, and to secure the concurrence of the Tasmanian Legislature in meeting that difficulty an arrangement was reached, and embodied in the legislation, which, it is submitted, vitiates it. The arrangement was that, while the Commonwealth would, by their taxing Acts, impose an equal tax on all flour consumption, whether in Tasmania or in the other States, the tax so collected was to go to a central fund, and out of that fund there was to be refunded to Tasmania a special sum for distribution by the Tasmanian authorities to the taxpayers. It was simply giving back to the taxpayer the money which the Central Government had collected. The legislation must be looked at as a whole, as part of a scheme, and looking at its substance and real nature, looking behind the form to the reality, the Commonwealth Government are imposing what purports to be a uniform tax, but what in effect is a tax upon flour in all the States other than Tasmania. In considering the Commonwealth legislation the effect intended, and arrived at, must be taken into account. If it is found that in substance the legislation was directed to obtaining a fund by taxing flour in all the States except Tasmania, though that result be arrived at by indirect means, the Board will say that what cannot be done directly cannot be done indirectly. It would be abusing the powers conferred by s. 96 of the Constitution Act to make use of them for the purpose of evading the restriction plainly imposed by s. 51 (ii.). What the Commonwealth Parliament cannot do, and what they did in this case, was to grant what was in effect a rebate of the tax to a favoured State. [Detailed reference was made to the various taxing Acts (see judgment of the Board) and to the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48 of 1938, and the Wheat Industry Assistance Act, No. 53 of 1938, which latter Act, it was submitted, fell to be read as part of the scheme of legislation.] Sect. 14 of Act 53 of 1938 implements the bargain for the special grant to Tasmania, and they are not to get back more than the amount of tax which has been levied upon the flour in Tasmania. The Tasmanian Legislature then passed the Flour Tax Relief Act, No. 40 of 1938, making provision for the distribution of the

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special grant to millers and others. There has thus been a differentiation in the tax in relation to Tasmania, effected indirectly by arrangement with Tasmania. There is authority for the proposition that if a tax is imposed, and a rebate given, the real effect is that the tax is not imposed in full. The judgment of Evatt J. in the High Court sets out in detail the considerations which the appellants ask the Board to adopt. A rebate is to be regarded as part of the taxation legislation: *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co., Ld.* (1); the fact that the State, Tasmania, is interposed as a conduit pipe cannot affect the reality of the position. If financial assistance is given upon terms that the State shall use it in refunding it to the taxpayers, that does not differ from the position in which the rebate is made direct. Sect. 14, of Act No. 53 of 1938, when it is appreciated for what it really is, and the circumstances in which it was passed are looked at, is plainly Federal legislation which discriminates in taxation. It is an ultra vires exercise of the Commonwealth's power of taxation if it exercises it in pursuance of a bargain, one term of which results in discrimination. One must look behind the form at the reality of this particular legislation: *Attorney-General for Ontario* v. *Reciprocal Insurers* (2); *Ladore* v. *Bennett.* (3) If the reality is plainly something different from the form, the fact that the form is apparently in order ought not to be allowed to save a Statute which is otherwise objectionable. While in the present case there was a purported use of s. 96 of the Constitution Act to give financial assistance to Tasmania, the disclosed intention on a perusal of the legislation as a whole is to impose a scheme of taxation of a type prohibited by s. 51 (ii.); there was a colourable device to arrive at the desired taxation result. Sect. 96 in its position in this Constitution cannot fairly be made use of as a means of granting taxation refunds and producing in that way inequality of taxation; it would be a colourable use of that power, concealing the real taxation scheme. If the appellants be right in their constitutional complaint, the result is that they are bearing a larger proportion of the burden which is necessary to give effect to this scheme than would be so if people in the same position as themselves in Tasmania were treated in the same way as they are. [Reference was also made to *Attorney-General for Alberta* v. *Attorney-General for Canada.* (1)] Under the cover of a broad scheme to help wheat growers the Federal Government has embarked upon a plan of taxation which in its reality results in a discriminative tax, and there has been a breach of the Constitutional safeguard under s. 51 (ii.).

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(1) [1930] A. C. 357.
(2) [1924] A. C. 328.
(3) [1939] A. C. 468.

Wilfrid Hunt followed. The fact that s. 14 of Act No. 53 of 1938 contains no express condition as to the application of the grant to Tasmania does not alter the position, because it is obvious that the grant was made solely for the purpose of enabling Tasmania to make the remissions of tax. The Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as it thinks fit under s. 96 of the Constitution Act, but not so as to enable any discrimination with regard to direct effects of taxation to take place. The legislation in question does infringe the restriction in s. 51 (ii.) of the Constitution Act.

Harold Murphy K.C. and *Hon. H. L. Parker* for the respondent. It is submitted that s. 51 (ii.) of the Constitution Act does not in any way govern s. 96 of that Act; s. 51 as a whole is "subject to this Constitution," whereas s. 96 stands alone, and is quite independent of any such qualification. The powers of the Commonwealth Parliament as stated in s. 51 are themselves subject to the other provisions in the other sections of the Constitution. It is of course conceded that there might be a colourable use of the powers under s. 96, a case where the pith and substance of the legislation would have to be looked at to ascertain whether it was a genuine case of financial assistance. [Reference was made to *State of Victoria* v. *The Commonwealth* (2).] The Acts on which the respondent is suing, Nos. 48 and 50 of 1938 of the Commonwealth Parliament, are taxing Acts in form and substance, dealing with the imposition of taxation, and nothing else. No part of the

(1) [1939] A. C. 117.

(2) (1926) 38 C. L. R. 399.

relevant Commonwealth legislation discriminates, directs discrimination or authorizes discrimination qua taxation. Sect. 51 (ii.) is concerned purely with taxation, and if there is discrimination in this case it is the effect of the Tasmanian Act. Sect. 14 of the Wheat Industry Assistance Act, No. 53 of 1938, cannot be described as effecting a refund of tax ; that might have been the result of the Tasmanian legislation, but under s. 14 of Act No. 53 of 1938 there is a grant to the State, and, while it may be admitted that it was well known how Tasmania was going to deal with it, it is in fact a grant to that State simpliciter, and without any obligations being imposed upon the State as to how it was to deal with it. If invalidity begins anywhere, it begins with the Tasmanian Act, or, going back further, with the grant of the Minister under s. 14 of Act No. 53 of 1938. That latter Act, however, is not an Act relating to taxation at all. It is submitted that this was a perfectly valid grant under s. 96, and that it is completely unaffected by s. 51 (ii.) of the Constitution Act. As already stated, s. 96 stands quite independently of s. 51 (ii.) as a substantive part of the Commonwealth Constitution. Even if something in s. 14 of Act No. 53 of 1938 or in s. 5 of the Tasmanian Act, No. 40 of 1938, were to be held invalid, there is no reason why that should also invalidate Acts Nos. 48 and 50 : s. 15A of the Commonwealth Acts Interpretation Act, 1903–37. [Reference was also made to *In re The Initiative and Referendum Act* (1) ; *Shell Company of Australia, Ld.* v. *Federal Commissioner of Taxation* (2) ; and *British Coal Corporation* v. *The King.* (3)] It cannot be said that s. 14 of Act No. 53 is so interwoven into the scheme that it must of necessity break down if s. 14 goes. The principle of construction both as regards the Constitution and Act No. 53 of 1938, is to be found in the *British Coal Corporation* case. (3) Reliance is also placed on the reasoning in the judgments of Latham C.J. and Starke J.

Wilfrid Barton K.C. and *A. C. Nesbitt* for the interveners, the Attorneys-General for the States of New South Wales,

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(1) [1919] A. C. 935, 944.
(2) [1931] A. C. 275, 298.
(3) [1935] A. C. 500, 518.

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Victoria, South Australia and Tasmania, stated that the Commonwealth legislation challenged by the appellants was beneficial to each of the States intervening, and that they desired that its validity should be upheld. The interveners adopt the case lodged on behalf of, and the argument presented for, the respondent. In considering the validity of Federal legislation the Acts should be considered according to their tenor and their effect in working, and not considered in view of the legislation of another independent Legislature. Upon no principle of construction can it be said that these Federal Acts, which contain no condition as to the employment of the money granted to the State of Tasmania, can be rendered invalid by any use which Tasmania may make of that money, whether such use be agreed as a political bargain with the Commonwealth or with the States or with anyone else. Immense difficulties would arise if it should be held that under any circumstances an enactment by a State could invalidate a Federal statute.

Wilfrid Hunt replied.

May 30. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM. This is an appeal, by special leave, from a judgment of the Full High Court of Australia, dated June 7, 1939, consisting of Latham C.J., Rich, Starke, Evatt and McTiernan JJ. By the judgment it was ordered that the respondent (plaintiff in the action) do recover against the appellants the sum of 85*l.* 12*s.* for flour tax and additional tax alleged to be due to the Commissioner of Taxation under the provisions of two Commonwealth Acts, entitled the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, No. 48, and the Flour Tax (Stocks) Act, 1938, No. 50. The grounds of defence were that the appellants were not indebted as alleged for the reason that the two Acts were invalid and ineffective as being ultra vires the Commonwealth Parliament. This defence raises questions of great constitutional importance.

It is not in dispute that the two Acts mentioned, together with several other Acts, to be referred to later, were passed to give effect to a scheme which had been agreed between the Prime Minister of the Commonwealth and the Premiers of the six States after a conference at Canberra. The scheme is in fact mentioned in a preamble to one of the Acts in question. Its object and purpose was to ensure to wheat growers in all the States a payable price (as it was called) for wheat, and to raise the necessary sum by imposing a tax upon flour sold in Australia for home consumption. The Premiers on behalf of the States undertook to co-operate in the scheme by passing Acts in the States fixing prices for flour sold for home consumption, and providing for the distribution of the proceeds of the tax among wheat growers in proportion to the quantities of wheat respectively produced by them. The millers, it was assumed, would pass on the tax to the consumers, so that the ultimate result of the scheme would be that bread and other products of flour would be a little dearer than before, while the growers of wheat would be enabled to continue in business with the assistance of payments by the Commonwealth securing to them a payable price for their wheat. But here there arose a difficulty. Tasmania was in a special position, inasmuch as she alone of the States of the Commonwealth imports wheat from other States, and does so because the quantity of wheat grown in Tasmania is relatively insignificant. The result of this circumstance is that the people of Tasmania, if treated like the other States, would in the end have to bear the excise duty on flour by paying an increased price for bread and other wheat products, whilst that State, or its inhabitants, would receive very little advantage from the distribution of the proceeds of the taxes which were being imposed on flour. This difficulty was by agreement to be met in this way. The scheme was to provide that the tax on flour was to be levied on flour consumed in Tasmania at the same rate as on flour consumed in the other States, but provision was to be made for the relief of Tasmania as a State to an amount not greater than the tax on flour collected in Tasmania. It was intended (following a course which had been previously adopted in Tasmania) that persons who paid the flour tax there would obtain relief out of the sums

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to be paid by the Commonwealth to Tasmania in the manner hereafter described.

Their Lordships agree with the High Court in the view that in the circumstances of the case there can be no objection to examining the scheme, including the record of what was done at the conference at Canberra ; and they also agree that an examination of that record does not add anything to what is apparent upon the face of the Federal and State statutes. There has been no attempt to disguise, still less to conceal, what has been done in this matter, and the reasons for doing it. The scheme admittedly could not have been carried out by the Commonwealth Parliament alone, and the main question is whether in the course of taking the predominant part in carrying out the scheme that Parliament has infringed the Constitution. Their Lordships, however, think it right to add that, at any rate in such a case as the present, where there is admittedly a scheme of proposed legislation, it seems to be necessary when the " pith and substance " or " the scope and "effect " of any one of the Acts is under consideration, to treat them together and to see how they interact. The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine. In the present case the purpose and substance of the Acts as a whole, which means little more than their scope and effect, may properly be looked at. The purpose in this sense is inseparably connected with the substance. This does not mean that the Court is to seek out the objects, or the purpose, still less the intentions of the members of the Parliament, or the members of the Government responsible for passing the measure, but that, just as in construing a statute it is often necessary to ascertain the mischief which it was sought to remedy, so in such a case as the present it is necessary to examine the scheme, and to have regard to its ultimate effect or its function as shown in the various Acts, and also, of course, to its substance: see the majority judgment in *The King* v. *Barger*. (1)

The scheme, as will shortly appear, was carried out by six

(1) (1908) 6 C. L. R. 41, 74–5.

Commonwealth Acts and by certain State Acts passed by the various States. The Acts passed by the Commonwealth Parliament imposing taxation provide, as the Constitution requires, for uniform taxes throughout the Commonwealth; but it is contended by the appellants that those Acts are "part of a scheme of taxation operating, and intended to "operate, by way of discrimination between Tasmania and "the other States," and that such Acts and taxes are accordingly contrary to the provisions of s. 51 (ii.) of the Constitution, and are therefore ultra vires the Commonwealth and void.

It is convenient to mention here that a number of other objections to the Acts and the taxes were raised before the High Court of Australia, and are dealt with in the judgments of that Court, but they were not raised before this Board, and need not be further mentioned.

On December 2, 1938, the Commonwealth Parliament passed four Acts imposing taxes upon flour and wheat, and also an Act providing the machinery for the assessment of such taxes. These Acts are entitled, and briefly provide, as follows:—

The Flour Tax Act, 1938 (No. 49), which imposed a tax on flour manufactured in Australia by any person, and on or after December 5, 1938, sold by him or used by him in the manufacture of goods other than flour.

The Flour Tax (Stocks) Act, 1938 (No. 50), which imposed a tax on flour in excess of 1000 lbs. held in stock on December 5, 1938, by any person other than the manufacturer of the flour.

The Flour Tax (Imports and Exports) Act, 1938 (No. 51), which imposed a tax on flour imported into Australia and on or after December 5, 1938, entered at the Customs for home consumption, and also a tax upon wheat exported from Australia on or after a date to be fixed by Proclamation.

The Wheat Tax Act, 1938 (No. 52), which imposed a tax on wheat grown in Australia and on or after a date to be fixed by Proclamation sold to a wheat merchant.

The Flour Tax (Wheat Industry Assistance) Assessment Act, 1938 (No. 48), which provided the machinery relating to the imposition, assessment and collection of the above taxes.

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These Acts were designed, according to the scheme, to raise money by taxing flour and flour products so as to provide a fund available for the payment of moneys to farmers of wheat. The tax was fixed upon the basis that 5*s*. 2*d*. per bushel of wheat on rail at Williamstown was a remunerative price, and the Acts were framed so as to secure to the wheat farmers a payment upon the basis of 5*s*. 2*d*. per bushel on rail at Williamstown. If the price of wheat rose above that amount a tax was to be imposed on wheat so as to form a fund out of which moneys could be paid to millers.

On the same day the same Parliament passed another essential part of the scheme, the Wheat Industry Assistance Act, 1938 (No. 53). There is a preamble to this Act which briefly details (but without reference to Tasmania) the circumstances under which the Acts were passed, and the general nature of the scheme which it was hoped to carry into effect. The preamble is in the following terms:

"Whereas at a Conference between the Prime Minister of the "Commonwealth and the Premiers of the States held in "Canberra, at the request of the Premiers, on the twenty-ninth "day of August, One Thousand nine hundred and thirty-eight, "the co-operation of the Government of the Commonwealth "was sought in putting into operation a scheme to ensure to "wheat growers a payable price for wheat:

"And whereas the Premiers on behalf of their respective "States undertook that, if the Commonwealth agreed to "co-operate in the said scheme, legislation would be passed "by the said States providing for the fixing of such prices for "flour sold for home consumption in Australia as would provide "for wheat growers a payable average price on all the wheat "produced by them:

"And whereas, in order to ensure a payable price in respect of "the wheat sold for home consumption in Australia, it was "represented at the said Conference that it would be necessary "that a tax be imposed upon flour sold for home consumption "in Australia and that the proceeds of the tax be distributed "among wheat growers in proportion to the quantities of "wheat respectively produced by them:

"And whereas the Prime Minister on behalf of the Commonwealth agreed that the Commonwealth would co-operate in "the said scheme and that any legislation necessary on the "part of the Commonwealth would be submitted to the "Parliament of the Commonwealth:

"And whereas legislation has been passed by the Parliaments "of the States providing for the fixing of prices for flour sold "for home consumption in Australia."

The most material sections of the Act were to the following effect:—

Sect. 5 provided for the creation of a Wheat Industry Stabilisation Fund, into which should be paid all moneys to be collected under the Flour Tax (Wheat Industry Assistance) Assessment Act, No. 48, and this covered flour tax under the Flour Tax (Stocks) Act, No. 50.

Sects. 6 and 7 provided for payment out of the said fund of certain payments to the States respectively in the nature of financial assistance.

Sect. 14 provided for payment out of the said fund to the State of Tasmania of such amount in each year by way of financial assistance as the Minister should determine, but so that the amount so to be paid in any year should not be greater than the sum by which the amount collected in that year for flour tax under the Assessment Act, No. 48, in respect of flour consumed in that State, exceeded the total paid to that State in respect of that year under ss. 6 and 7 aforesaid, and no amount should be payable under s. 14 in respect of any year during which no tax (subject to an exception therein mentioned) was collected under the Assessment Act, No. 48.

It will be noted that s. 14 provides for special grants to the State of Tasmania in accordance with the scheme, and these are the payments (the greater parts of which were intended to be repaid to the millers) which it is asserted in effect amount to a discrimination in favour of Tasmania.

The State Parliaments had either passed Acts, or had an applicable statute in operation, enabling them to fix the prices (at least maximum prices) of flour and bread in their States. The Tasmanian Act was entitled the Flour Tax Relief Act, 1938, and,

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like all the other Acts, was assented to on December 2, 1938. It provided that persons in the State who paid flour tax to the Commonwealth might apply to a State official for relief, and might thereupon obtain a payment by way of relief in respect of the flour tax paid by them, or, at least, a large part of it.

The result of the scheme of Federal and State legislation is admirably summarized in the judgment of Latham C.J.: "A Federal excise duty is imposed upon flour which is paid "upon the same basis by persons in all States. The proceeds of "the duty go into the Federal consolidated revenue. An "equivalent sum is then taken from the consolidated revenue "and is paid by the Commonwealth by way of financial assist-"ance to the States of the Commonwealth, upon condition that "the States apply the moneys in the assistance and relief of "wheat growers. In the case of Tasmania, however, a special "grant is made by the Commonwealth which is not subject to "any Federal statutory conditions, but which, in fact, is "applied, and which it was known would be applied, by the "Government of Tasmania in paying back to Tasmanian "millers and others nearly the whole of the flour tax paid by "them in respect of flour consumed in Tasmania." (1)

Its ultimate purpose or effect, whichever word is preferred, is to enable growers of wheat to continue in business.

The first question to be considered is whether, inasmuch as the Federal Taxation Acts (Nos. 48 and 50 of 1938, above shortly stated) do not in any way discriminate between States or parts of States, there is anything to invalidate those Commonwealth Taxation Acts as being ultra vires. Sect. 51 (ii.) of the Constitution provides that the Commonwealth Parliament shall have power to make laws " with respect to "taxation, but so as not to discriminate between States or "parts of States." This, it is truly said, relates only to the law-making powers of the Commonwealth. The ultimate discrimination in favour of Tasmania in this case arises, it is contended, from the Tasmanian Act above mentioned; and the action of that Legislature in relation to the sums paid to the State by the Commonwealth cannot be an infringement

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(1) (1939) 61 C. L. R. 756–7.

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of s. 51 (ii.), because that section does not apply to the Parliament of Tasmania. Anything, it is suggested, will be intra vires provided that the Commonwealth's Taxation Act or Acts do not infringe the terms of s. 51 (ii.). With the greatest respect to those judges in Australia who may have accepted this contention, it seems to their Lordships to go too far, and certainly much further than is necessary for the decision of the present case. It would seem to justify every case in which there is a Taxation Act containing no discriminatory provisions followed by an Appropriation Act, or a Tax Assessment Act, passed by the Commonwealth Parliaments authorizing exemptions, abatements or refunds of tax to taxpayers in a particular State. It was argued before their Lordships that this would be intra vires. In the view of this Board it is impossible to separate such an Appropriation or Tax Assessment Act from the Taxation Act in considering the effect of s. 51 (ii.), or to turn a blind eye to the real substance and effect of Acts passed by the Federal Parliament at or about the same time, if it appears clear from a consideration of all the Commonwealth Acts that the essence of the taxation is discriminatory. Laws imposing taxation must deal with one subject of taxation only (s. 53 of the Constitution), and the established practice in Australia is to follow the Taxation Act with an " Assessment " Act providing for the collection and recovery of the tax, for exemptions and for refunds in appropriate cases. In the opinion of their Lordships, these Acts are all laws " with respect to taxation," all " relate to taxation," and taken together must not discriminate between States or parts of States.

In the present case, however, the matter is not so simple. The discrimination in favour of Tasmania, if it should be so described, is effected by the exercise in combination of three powers. One is that of the Commonwealth Parliament derived from s. 51 (ii.), already mentioned; another is that contained in s. 96 of the Constitution, under which the Commonwealth Parliament can grant financial assistance to any State or States so long as that power remains in force. The third power is that of the Tasmanian Parliament to

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distribute the financial assistance obtained from the Commonwealth in giving relief to persons within the State who pay flour tax. A discrimination brought about in this way is asserted to be unobjectionable, since it is not within the prohibition on Commonwealth Powers contained in s. 51 (ii.).

The first answer of the appellants to this contention is that s. 51 (ii.) contains a constitutional prohibition against any discrimination as regards taxation between States or parts of States, from which it is said to follow that no grant of financial assistance can be made to any State which would have the effect, directly or indirectly, of creating such a discrimination. It is impossible to accept the contention in this wide form; for s. 51 relates to a number of powers which are conferred upon the Commonwealth Parliament as regards the laws which may be made by Parliament for the peace, order, and good government of the Commonwealth, and these powers are expressly made " subject to this Constitution," a qualification which must include the power under s. 96 (for a period which might be limited) to grant financial assistance to any State. So far from s. 96 being subordinate to s. 51 (ii.), or, it may be added, to s. 51 (iii.), it would be more plausible to contend that powers conferred by s. 51 are subordinate to s. 96, and that the power of the Parliament under that section can be exercised even so as to effect a plain discrimination. The question then arises whether this view can be accepted with or without qualification.

In dealing with the true construction of a Constitutional Act such as we are now considering, it is necessary to bear in mind that it substitutes a federal commonwealth for a number of separate colonial governments with their own legislative assemblies and powers of self-government. Such matters as tariffs, taxation, bounties, intercommunications, have to be agreed between the constituent States before federation is possible, and it is evident that the constitution ultimately agreed upon will contain certain prohibitions intended to provide fair and equal treatment between the States so far as that is reasonably possible in a written constitution. Without travelling into the history of the making of the

Australian Commonwealth during the years from 1889 to 1900, or the special circumstances of the six States which by referendum agreed to the bill which contained the Constitution ultimately embodied in The Commonwealth of Australia Constitution Act of 1900, there can be no doubt as to the necessity for the important restrictions or powers contained in the sub-clauses of s. 51: "(ii.) Taxation; but so as not to "discriminate between States or parts of States. (iii.) Bounties "on the production or export of goods, but so that such "bounties shall be uniform throughout the Commonwealth."

On the other hand, no one can suppose that these qualifying sentences were ever regarded as affording protection against inequality as between the States in the incidence of taxation or in the advantages to be gained from bounties. The Commonwealth is very rich in minerals of many kinds, but they are, of course, unequally distributed between the States. Moreover, the climatic and soil conditions and the state of development are very different in these various areas. Uniform taxes on selected metals or, for example, on the coal produced in the States, may impose a heavy burden on some States whilst leaving other States wholly untouched, or only slightly affected; and the same remark is true as to the agricultural produce or the products of stock-raising in the various States: see *The King* v. *Barger*. (1) This was, and is, obvious, and it would be a mistake to regard the restrictions contained in s. 51 (ii.) and (iii.) as providing for equality of burden as regards taxation, or equality of benefit as regards bounties. That could, perhaps, have been achieved by provisions of a very different nature, which would have had regard to the amounts raised by taxation, or the amounts of the bounties received, in the different States. There was no attempt to do this in the Constitution, and sub-s. (ii.) of s. 51 provides only that taxation shall be such that it does not discriminate between States. As Isaacs J. observed in *The King* v. *Barger* (2), a statement approved in *Cameron* v. *Deputy Federal Commissioner of Taxation for Tasmania* (3):

(1) (1908) 6 C. L. R. 41, 70.
(2) Ibid. 108.
(3) (1923) 32 C. L. R. 68.

" . . . . the pervading idea is the preference of locality "merely because it is locality, and because it is a particular "part of a particular State. It does not include a differentiation based on other considerations, which are dependent on "natural or business circumstances, and may operate with "more or less force in different localities; and there is nothing, "in my opinion, to prevent the Australian Parliament, charged "with the welfare of the people as a whole, from doing what "every State in the Commonwealth has power to do for its "own citizens, that is to say, from basing its taxation measures "on considerations of fairness and justice, always observing "the constitutional injunction not to prefer States or parts "of States."

We must now consider s. 96, which is found in c. IV., "Finance and Trade." It is in these terms: "During a "period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, "the Parliament may grant financial assistance to any State "on such terms and conditions as the Parliament thinks fit." There are no restrictions whatever in this section, and it is clear that while the section remains in operation, the Parliament—apart from the restrictions contained in s. 51, which must be considered in a moment—may in the matter of financial assistance discriminate between States as much as it thinks fit.

Their Lordships have accordingly to bear in mind, first, that s. 51 (ii.) prohibits discrimination between States or parts of States, but is not concerned to deal with the matter of equality of burden; and secondly, that s. 96 does not prohibit discrimination. It is difficult to see any ground for an attack on the scheme, or on the various Acts which carry it into effect, in so far as that attack is really based on the exercise by the Commonwealth Parliament of its powers under s. 96. Those powers are plainly being used for the purpose of preventing an unfairness or injustice to the State of Tasmania, or, indirectly, to some or all of its population. Such discrimination as may result between millers or their customers in Tasmania and in the other States is a by-product, so to speak, of the endeavour to equalize the burden of the legislation by diminishing the special burden on Tasmania; and it is of first importance to note that this is brought about by an exercise of power under s. 96, which does not itself prohibit discrimination. Great reliance was placed by the appellants on the scheme; but, in the view of their Lordships, the scheme adds nothing to the argument; for there is nothing in s. 51 to prevent the Commonwealth Parliament from passing measures in concert with any State or States with a view to a fair distribution of the burden of the taxation proposed, provided always that the Act imposing taxes does not itself discriminate in any way between States or parts of States, and that the Act granting pecuniary assistance to a particular State is in its purpose and substance unobjectionable. In other words, it seems to their Lordships, as it seemed to the High Court, that the various Commonwealth and State Acts, if considered together as part of an organic whole, contain nothing which is prohibited in the Constitution.

In coming to this conclusion their Lordships wish to make it clear that, as at present advised, they do not take the view that the Commonwealth Parliament can exercise its powers under s. 96 with a complete disregard of the prohibition contained in s. 51 (ii.), or so as altogether to nullify that constitutional safeguard. The prohibition is of considerable importance; and the Constitution should be construed bearing in mind that it is the result of an agreement between six high-contracting parties with, in some respects, very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under s. 96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be ultra vires the Commonwealth Parliament. Their Lordships are using the language of caution because such a case may never arise, and also because it is their usual practice in a case dealing with constitutional matters to decide no more than their duty requires. They will add only that, in the view they take of the matter, some of the legislative

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expedients—objected to as ultra vires by Evatt J. in his forcible dissenting judgment—may well be colourable, and such Acts are not receiving the approval of their Lordships. In the present case there seems to be no valid ground for suggesting that the sums payable to the Government of Tasmania pursuant to s. 14 of the Wheat Industry Assistance Act, 1938 (No. 53), are not in the nature of genuine financial assistance to the State, paid for the purpose of equalizing the burden on the inhabitants of Tasmania of taxation which was being imposed on all the millers throughout the Commonwealth for an end which might reasonably be considered to be both just and expedient.

Having regard to the view above expressed, it is not necessary to deal with the point on which Starke J. primarily relied, namely, that even if s. 14 of the Wheat Industry Assistance Act (No. 53), was invalid, it could be treated as severable and distinct from the other provisions of that Act, and that its invalidity would not affect the legislation as a whole. On this difficult point their Lordships prefer to express no opinion.

In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the respondent's costs. The interveners will bear their own costs.

Solicitors for appellants: *Young, Jones & Co.*
Solicitors for respondent: *Coward, Chance & Co.*
Solicitors for interveners: *Light & Fulton.*

[HOUSE OF LORDS.]

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April 16, 17, 18; May 30.

WOLSTANTON, LIMITED, AND ATTORNEY-GENERAL OF DUCHY OF LANCASTER . . . . APPELLANTS;

AND

NEWCASTLE-UNDER-LYME CORPORATION . . . . RESPONDENTS.

Mine—Surface let down—Alleged custom or prescriptive right to let down surface without paying compensation.

A custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings is unreasonable.

Hilton v. *Granville* (*Earl*) (1845) 5 Q. B. 701, applied.

Prescription in the common law, which in many respects resembled a custom, was based upon the presumption of a grant which has been lost by process of time. For those who allege a custom it is not necessary to show how it arose or might have arisen.

Per Viscount Maugham. The reservation by a judge or a Lord of Appeal of the right to reconsider a decision at some later date ought not to be taken as a statement that he thinks the decision was erroneous.

Decision of Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal, affirming an order of Farwell J.

The mayor, aldermen and burgesses of the borough of Newcastle-under-Lyme, the plaintiffs in the action, were the owners and in occupation of certain freehold hereditaments in Wolstanton on which a fire station had been erected. These hereditaments were formerly of copyhold tenure, being held of the manor of Newcastle-under-Lyme, and they became vested in the plaintiffs by virtue of s. 28 of the Borough of Newcastle-under-Lyme (Extension) Order, 1931. These premises were enfranchised under the Law of Property Act, 1922. The manor, at all material times, was vested in His Majesty the King in the right of the Duchy of Lancaster. The plaintiffs admitted that the mines and minerals under or near the plaintiffs' said hereditaments formed at all material times part of the property of the Duchy. Those mines and minerals had been leased by or on behalf of His Majesty to the defendant company with powers to mine and carry away the coal, ironstone or other minerals over a large area including that in which the plaintiffs' hereditaments were situate, and the defendants were mining and carrying away the minerals, and this, the plaintiffs alleged, was causing subsidence of the surface of the plaintiffs' hereditaments and causing damage to their land and buildings, the defendants wrongly contending, as the plaintiffs alleged, that the Duchy, as lord of the manor, was entitled as of right by itself, its lessees and licensees, to work, and the defendants, as such lessees, were entitled to work the said minerals notwithstanding that such working let down, injured or destroyed the surface of the land and the buildings and erections thereon, and without making any payment in respect of damage to the surface and buildings. The plaintiffs claimed (*a*) a declaration that the defendants were not entitled to mine or carry away minerals under or near the plaintiffs' hereditaments in such manner as to let down the surface of the land and the buildings thereon ; (*b*) an injunction restraining the defendants from working the minerals so as to injure the plaintiffs' buildings ; and (*c*) damages.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

The defendants, Wolstanton, Ld., pleaded that as lessees of the Duchy they had the right to work the mines and minerals, and for that purpose to make all necessary excavations and other works, whether on the surface of or under any lands parcel of the manor, doing no more than necessary for the purpose, and making a reasonable compensation to the tenants and occupiers of the surface lands in respect of any damage occasioned to the surface, but without making compensation in respect of the surface on any other account and without making compensation for damage occasioned to any messuages, dwelling-houses or other buildings that might be erected on lands copyhold or formerly copyhold of the manor : (*a*) By reason of a custom existing in the said manor from time immemorial that the owner or owners for the time being of the said manor and of the said mines and minerals and his or their

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assigns tenants and licensees should so work the said mines and minerals ; (*b*) By reason of His Majesty and His predecessors in title, owners as aforesaid of the said manor and of the said mines and minerals, and His and their assigns tenants and licensees having as of right from time immemorial so worked the said mines and minerals ; (*c*) By reason of His Majesty and His predecessors in title, owners as aforesaid of the said manor and the said mines and minerals, and His and their assigns tenants and licensees having as of right and without interruption for sixty or thirty, or alternatively for forty or twenty years last before the commencement of the action so worked the said mines and minerals ; (*d*) By reason of a grant or covenants (which ought to be presumed) by the copyhold tenants of the said manor that His Majesty and His predecessors, in title owners as aforesaid of the said manor and of the said mines and minerals, and His and their assigns, tenants and licensees should so work the said mines and minerals.

The defendants also contended that long before and at the time of the erection of the buildings situate on the plaintiffs' said hereditaments the land constituting the site of the said hereditaments was parcel of the said manor and subject to the customs thereof and to the rights of the owner of the said manor and his or her assigns tenants and licensees and that the said land is still subject to the customs and rights aforesaid. The said rights are exerciseable by these defendants as such lessees as aforesaid and the damage complained of by the plaintiffs (if and so far as attributable to any acts of these defendants) has been occasioned by the exercise of the rights aforesaid.

The defendant, the Attorney-General of the Duchy of Lancaster, by his defence, pleaded in the same terms as Wolstanton, Ld.

Farwell J. held himself bound by the decision in *Hilton* v. *Granville* (*Earl*) (1), in which the validity of the custom in question in the manor of Newcastle-under-Lyme came in question, and it was there held that the custom alleged was bad in law.

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(1) (1845) 5 Q. B. 701.

The Court of Appeal agreed with Farwell J. that as the decision in *Hilton* v. *Granville* (*Earl*) (1) had stood unchallenged for three generations, and must have affected all those within the ambit of the manor, it was the duty of the Court to hold fast to that which had so long ago been decided to be the local law.

Wolstanton, Ld., and the Attorney-General for the Duchy of Lancaster appealed to this House.

R. F. Roxburgh K.C. and *Leonard Stone* (for *W. J. C. Tonge*, absent on war service) for Wolstanton, Ld. Two questions are involved, first, whether the custom we allege is necessarily unreasonable, and, secondly, whether assuming we establish that it is not necessarily unreasonable, any contrary decision ought to be given in view of the decision in *Hilton* v. *Granville* (*Earl*). (1) The basis of that decision was that the custom set up was necessarily bad on one ground only—namely, that it would be destructive of, and therefore repugnant to, the grant. There we submit the Court of Queen's Bench erred in not taking notice of the comparatively small value of the land at that date, and in deciding the question altogether in the abstract without having any information before it as to the circumstances in which the custom might be presumed to have originated. There the test applied in *Salisbury* (*Marquis*) v. *Gladstone* (2) was not applied. Moreover, the decision in *Hilton* v. *Granville* (*Earl*) (1) has been frequently doubted by judges and textwriters, and we ask the House not to assume that the decision has always been acted upon: see *Hilton* v. *Granville* (*Earl*) (3), where it was alleged that injuries to buildings in the same neighbourhood "had always been repaired by the owners "of the buildings at their own expense, or that, if compensation "had in any case been made, it had been made as a matter of "favour and not as of right, it being notorious in the neighbourhood that all buildings on the copyhold parts of the manor "were erected at the risk of the copyholders, and were subject "to the rights of the lessees of the mines." In *Rowbotham* v. *Wilson* (4) it was stated in argument that the authority of

(1) 5 Q. B. 701.
(2) (1861) 9 H. L. Cas. 692.
(3) (1841) Cr. & Ph. 283, 287.
(4) (1857) 8 E. & B. 123, 137.

Hilton v. *Granville* (*Earl*) (1) "is questionable," and again (2), that the case "is now universally acknowledged to be bad law"; see, too, an observation to the same effect in Elton on Copyholds, 2nd ed., p. 234, and per Lord Hatherley in *Duke of Buccleuch* v. *Wakefield.* (3) These cases point to *Hilton* v. *Granville* (*Earl*) (1) being no longer of authority.

Sir Herbert Cunliffe K.C. (Attorney-General of the Duchy of Lancaster), *Charles R. R. Romer K.C.* and *A. Andrewes Uthwatt*, for the Duchy of Lancaster. We adopt the argument submitted to the House on behalf of the first appellants. Further, in *Buchanan* v. *Andrew* (4) land was held on a feu, as to which it was stipulated that the feuar should have no claim against the superior or his tenants in respect of damage that might arise from the working of subjacent minerals, and this House, reversing the decision of the Court of Session, held that the feuar was bound by the contract which he had entered into. Lord Chelmsford in that case said (5) "I put the case to the "learned counsel for the respondent, of land feued with an "obligation to build a house and keep it in repair, with a "reservation to the superior of the power to remove the house "at any time if it interfered with the exercise of rights which "he possessed. And he admitted that such an agreement "would be perfectly valid. Indeed, to deny this would be to "adopt the dictum of Lord Denman in *Hilton* v. *Granville* " (*Earl*) (6), which was frequently doubted, and at last has been "distinctly overruled." Baggallay L.J. in *Bell* v. *Love* (7) made some observations opposed to the view we present, but they were quite unnecessary for the decision of that case and should not be followed. *Bateson* v. *Green* (8) decided that the right of commoners in a common may be subservient to the right of the lord in the soil, so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners. Tindal C.J. in *Tyson* v. *Smith* (9) said that a custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, and that a custom comes at last to an agreement which has been evidenced by such repeated acts of assent on both sides from the earliest times, that it has become the law of the particular place. We contend that this accurately states the law as to the position here.

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(1) 5 Q. B. 701.
(2) (1857) 8 E. & B. 123, 139.
(3) (1870) L. R. 4 H. L. 377, 399.
(4) (1873) L. R. 2 H. L. (Sc.) 286.
(5) Ibid. 296.
(6) 5 A. & E. 701.
(7) (1883) 10 Q. B. D. 547, 558.
(8) (1793) 5 T. R. 411.
(9) (1838) 9 A. & E. 406, 421, 425.

Charles Harman K.C. and *Wilfrid M. Hunt* for the respondents were not called upon.

The House took time for consideration.

1940. May 30. VISCOUNT MAUGHAM. My Lords, in the year 1841 one Hilton, who owned some houses which were alleged to be copyhold of the manor of Newcastle-under-Lyme, which belonged to the Crown in right of the Duchy of Lancaster, started proceedings in Chancery to restrain the Earl of Granville, lessee from the Crown, from working his mines of coal and ironstone so as to injure the plaintiff's premises and houses by subsidence. The recent workings it was stated had created great alarm and anxiety amongst the copyhold proprietors within the townships of Hanley and Shelton, the greater part of which were within the manor. The motion for an injunction came on for hearing before Lord Cottenham L.C. in *Hilton* v. *Granville* (*Earl*). (1) The defendants set up a custom and also a prescriptive right to work the mines under the copyholds of the manor, making a reasonable compensation to the tenants for the use of the surface, and damage to the surface by the working, but without making compensation in respect of the surface on any other account, and without making compensation for any damage occasioned to any buildings on the surface. Lord Cottenham was unwilling to grant an injunction which might have had the effect of stopping the mining operations; but he directed the motion to stand over, the plaintiff undertaking to bring an action at law for the purpose of trying the right claimed by the defendant.

Litigation in those days was conducted with dignified leisure, and it was not till the year 1844 that the legal question came on

(1) Cr. & Ph. 283.

for hearing before the Queen's Bench in the case of *Hilton* v. *Granville* (*Earl*). (1) The judges were Lord Denman C.J. and Patteson, Coleridge and Wightman JJ. The custom was set up in the pleading of the defendant and a claim on a prescription was also pleaded. There were two demurrers. The arguments on both sides are elaborately reported. It is worth noting that counsel for the plaintiff was not allowed to argue that the lord could not prescribe against his copyhold tenant because it did not appear on the pleas that the premises were in fact copyhold; and the case was ultimately decided on the footing that the action was one on the case for injuring two ancient houses in the manor, one occupied by the plaintiff and one by his tenant. The judgment of the Court was delivered by Denman C.J. and was based on the ground that whether the pleas demurred to related to a prescription or a custom they could not be sustained at law because unreasonable. The question whether the houses were freehold or copyhold was stated as not affecting the case.

Your Lordships are now asked to hold that *Hilton* v. *Granville* (*Earl*) (1) was wrongly decided in a case where the same custom is set up by a tenant of the Crown in relation to the same manor of Newcastle-under-Lyme. It is therefore necessary to examine *Hilton's* case (1) with care, and to see how it has been dealt with when it has been cited in subsequent cases. Such a decision as to the local law of the lands within a manor ought not to be disturbed after over ninety years without very good reason.

My Lords, the Court of Queen's Bench in deciding that the custom was unreasonable, approved and relied on the authority of a case decided nearly a century before, which, as will be seen, has been accepted as good law in this House. The case relied on was that of *Broadbent* v. *Wilks* (or *Wilkes*). (2) If *Hilton's* case (1) comes within the principle of *Broadbent* v. *Wilks* (2) the former cannot be impeached. I will therefore mention the material facts in *Broadbent* v. *Wilks*. (2) The custom there alleged was a custom for the lord of the manor and his tenants to cast the slate and other rubbish coming from the working of coal mines upon the lands near to the pits belonging to customary tenants of the manor. It was held by the Courts that this custom was bad as being unreasonable and also as being uncertain. We are not concerned with the question of uncertainty which was mainly based on the word "near"; but the point as to unreasonableness was decided by Willes C.J. on this ground, that the custom might deprive the tenant of the whole profits of his land. The case was removed by writ of error into the Court of King's Bench, and there it was argued several times; but the judgment in the end (in 1745) was unanimously affirmed. Lee C.J. held that the custom was not reasonable inasmuch as it laid a great burden on the land of the plaintiff without any consideration appearing, either public or private, and also because it savoured of an arbitrary power and might totally deprive the tenant of the benefit of the land.

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(1) 5 Q. B. 701.

(2) (1742) Willes 360; S. C. (in error) 1 Wils. 63; 2 Str. 1224.

Returning to *Hilton's* case (1) it is to be observed that Denman C.J. in delivering the judgment cited *Broadbent* v. *Wilks* (2) at some length; and he went on to observe that the custom pleaded in the case before the Court was far more oppressive than that which was thus deliberately condemned by both Courts in *Broadbent* v. *Wilks*. (2) He referred to one or two other cases and concluded by saying (3) that "a claim "destructive of the subject-matter of the grant cannot be "set up by any usage."

The subsequent history of the litigation between Hilton and Lord Granville is shortly stated in a note at the end of the report in 5 Queen's Bench. It is sufficient for my purpose to say that the decision was never brought before a Court of Error, and, subject to a qualification which must now be stated, the case is still a binding authority in inferior Courts. It is, however, true that Denman C.J. went on to say that if the grant of the ancient houses could be produced reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and void, and he said that the

(1) 5 Q. B. 701.
(2) Willes 360; S. C. (in error) 1 Wils. 63; 2 Str. 1224.
(3) 5 Q. B. 730.

custom pleaded had that destructive effect. This view was not so absurd as it sounds at the present time, for, as Lord Blackburn states in *Dixon* v. *White* (1): "the contrary has now "been established, though not in England finally till *Rowbotham* "v. *Wilson* (2) in 1860, and not perhaps in Scotland till "*Buchanan* v. *Andrew*. (3)" In my opinion this erroneous view of the effect of a reservation by a grantor of a right which might involve the destruction of the surface granted does not seriously impair the authority on the point of unreasonableness of the decision of *Hilton* v. *Granville* (*Earl*). (4)

A somewhat similar matter came before the Court of Queen's Bench on demurrer in *Blackett* v. *Bradley*. (5) The custom there alleged was to work under the waste lands of the manor without paying compensation for subsidence. The Court consisted of Cockburn C.J., Blackburn and Wightman JJ., and strangely enough those eminent judges accepted without comment an express admission by the defendant's counsel that the case was indistinguishable from *Hilton's* case. (4) This was a mistake, since an alleged custom to mine under the copyhold and other tenements of the manor might be bad and such a custom confined to the waste of the manor might be good: see *Gill* v. *Dickinson*. (6) However, the Court was left to decide whether or not *Hilton's* case (4) was good law or at least binding on the Court. Cockburn C.J. delivered the judgment and after stating that the authority of the case was to some extent impaired by the mistaken view as to the effect of a hypothetical grant reserving a right to let down the surface, and observing that the decision itself had not met with the universal approval of the profession, he went on to say: "At the same time it is equally clear that, though the reasoning "of this Court in *Hilton* v. *Granville* (*Earl*) (4) has been impugned, "the decision in that case has not been overruled," and accordingly that they considered themselves bound by it. Incidentally it should be noted that during the argument Blackburn J. observed, in relation to the argument that the lord

(1) (1883) 8 App. Cas. 833, 843.
(2) (1860) 8 H. L. Cas. 348.
(3) (1873) L. R. 2 H. L. (Sc.) 286.
(4) 5 Q. B. 701.
(5) (1862) 1 B. & S. 940.
(6) (1880) 5 Q. B. D. 159.

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of the manor might have made a grant to the copyholders reserving the right claimed, that the answer to that might be that, though the parties might legally have made such a compact, it would not be reasonable to *presume* that they had done so. This view was, I think, adopted in the important case which is next to be considered.

Hilton v. *Granville* (*Earl*) (1) came up for discussion in this House in the case of *Salisbury* (*Marquis*) v. *Gladstone* (2); and it is necessary to refer to this authority in some detail since it seems to be the only modern case in which this House has considered the question of the validity of a custom set up as between the lord of a manor and his copyhold tenants. The plaintiff in that case was the lord claiming in ejectment for a forfeiture against a copyholder of inheritance for digging and taking clay from his copyhold tenement and selling the same off the manor, and the defendant justified his acts under a custom for copyholders of inheritance to do so without limit. The custom was held to be reasonable. Sir Hugh Cairns appeared upon the appeal to this House for the plaintiff, the lord of the manor, and he cited *Hilton's* case (1), and no one seems to have impugned its authority. On the contrary, Lord Cranworth appears to have accepted it as a correct decision, and the other two noble Lords who sat upon the hearing, Lord Wensleydale and Lord Chelmsford, said nothing to impugn that decision. Lord Cranworth's speech at first sight seems to be a little puzzling. He begins by saying that he cannot attribute much weight to the argument that a custom which would enable the copyholder to remove the whole of the clay off his lands, parcel of the manor, would be unreasonable as tending to the destruction of those lands. The relation between the lord and his copyholders must be thought to have had its origin in remote times by agreement between the lord as absolute owner of the whole manor and those whom he was content to allow to occupy portions of it as his tenants at will. Whatever restrictions therefore the lord may have imposed or whatever rights the tenants may have demanded, all were within the competency of the lord to grant or of the tenants to stipulate for. So far it would appear to the reader that Lord Cranworth was about to come to the conclusion that copyhold customs set up by the lord could never be held to be unreasonable. But he did not mean this for he went on to observe, "that when "it is said that a custom is void because it is unreasonable, "nothing more is meant than that the unreasonable character "of the alleged custom conclusively proves that the usage, even "though it may have existed immemorially, must have resulted "from accident or indulgence, and not from any right conferred "in ancient times on the party setting up the custom." He then proceeded to distinguish the case from three other cases where the custom relied upon had been held to be unreasonable and therefore bad. Those were *Broadbent* v. *Wilks* (1) which I have already mentioned; *Wilson* v. *Willes* (2), a decision of Lord Ellenborough that the custom in question was bad as being indefinite and uncertain, and thirdly the case of *Hilton* v. *Granville* (*Earl*). (3) Referring to that case Lord Cranworth observed as to the custom in suit (4) "Nor is it a custom "like that insisted on by the lord in *Hilton* v. *Granville* "(*Earl*) (3) which would have enabled the lord to undermine the houses of the copyholders, and without any notice "to them, to cause their houses to fall and crush those residing "in them, and that without making them any compensation." This seems to me, though it is true on a somewhat extreme view of the effect of the alleged custom, to be an approval of the authority. Lord Wensleydale said nothing about the suggested grant by the lord to his tenants; but it contained this passage which I will cite because it seems to me to place the matter on the proper footing (5): "There is no doubt whatever but that "the lord, being the owner of the soil originally, could have "given by express grant such a power, and even a much larger "power, to his tenants; but then when there is no express "grant, but one which is sought to be implied by usage, as a "custom is, it is a condition required by law, that the custom "should not be unreasonable; otherwise the prevalence of the

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(1) 5 Q. B. 701.

(2) 9 H. L. Cas. 692, 701.

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(1) Willes, 360.
(2) (1806) 7 East, 121.
(3) 5 Q. B. 701.
(4) 9 H. L. Cas. 702.
(5) Ibid. 704.

"use is to be referred to the ignorance or carelessness of those "whose property is affected by its exercise, rather than to a "grant." Lord Chelmsford, like Lord Cranworth, was apparently attracted to the idea of considering whether (1) "assuming that copyholds sprang from tenure in pure villenage, "it was at all unreasonable to suppose that the lord, in consideration of the performance by the tenant of the villein "services connected with his tenure, might give the tenant the "right to take away for his own benefit a portion of the lord's "soil within the tenement." To the answer that the custom claimed went to the entire destruction of the copyhold tenement he replied by saying that a portion of the soil might be exhausted but the tenement would remain. He also cited with approval *Broadbent* v. *Wilks* (2), on the ground that it would be unreasonable to presume a reservation so entirely inconsistent with the grant of the tenements as to involve the destruction of the whole profits of the land.

My Lords, since the year 1861 a good deal has been discovered by the researches of some very able legal historians in relation to the status and nature of villeins and villeinage and to the origin of the legal interest or estate called copyhold ; and I do not think we are called upon to accept the historical views of noble Lords in that year. But leaving those matters on one side, I think there are some important conclusions to be drawn from the case of *Salisbury* (*Marquis*) v. *Gladstone.* (3) The first for the present purpose is that the case of *Broadbent* v. *Wilks* (2) was approved, and that the principle that a custom would be bad if unreasonable was fully accepted. Next the case of *Hilton* v. *Granville* (*Earl*) (4) was accepted as good law by Lord Cranworth and was not commented upon adversely by the other Lords. Further, I think the House took the view that such a custom ought to be deemed to be unreasonable if the right claimed by the lord would or might involve the destruction of the whole profits of the copyholder. Lord Chelmsford stated this as being the conclusion in *Broadbent* v. *Wilks.* (2) Lord Cranworth stated it as the ground of the decisions which he accepted, and he accordingly distinguished the customs there alleged from the alleged custom in favour of the lord set up in the case before the House. Lords Cranworth and Chelmsford both decided that the custom was not unreasonable. Lord Wensleydale doubted whether the custom was a reasonable one ; but his speech was, I think, clearly in favour of the view that a custom which might cause substantial injury to either the lord or the tenants was generally to be held unreasonable.

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(1) 9 H. L. Cas. 707.
(2) Willes, 360.
(3) 9 H. L. Cas. 692.
(4) 5 Q. B. 701.

It is, however, asserted that the authority of *Hilton's* case (1) was impugned by Lord Hatherley L.C. in the case of *Duke of Buccleuch* v. *Wakefield.* (2) The trial judge, Malins V.-C. had approved or at least had followed *Hilton's* case. (1) In this House Lord Hatherley, after mentioning the fact went on to say: "Whether the authority of that case would now be "fully recognised or not, I do not stop to inquire." He then pointed out that the dictum in that case as to the effect of a grant with a reservation of a right to let down the surface had been overruled. He said nothing more about the case, probably because the general ground of the custom being bad because unreasonable was irrelevant to the question of the true construction of the Special Inclosure Act which was being considered, since that Act empowered the lord to work the mines with the widest powers imaginable on the terms of making reasonable compensation for damage done. Lord Chelmsford (3) also referred to *Hilton's* case (1) and observed, in passing, that, if that case was an authority that "where there is nothing to "show for the right but a customary exercise of it the custom "cannot be supported," it was open to question whether the decision was correct. But the weight of this doubt is I think greatly affected by the curious circumstance that he said the custom alleged was for a mine owner to work his mines letting down the surface, but paying compensation to the persons injured by the mining operations. This was a serious mistake, for compensation might well make all the difference. On careful consideration I must come to the conclusion that this case leaves the authority of *Hilton's* case (1) where it was.

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(1) 5 Q. B. 701.
(2) L. R. 4 H. L. 377, 399.
(3) Ibid. 410.

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The reservation by a judge or a Lord of Appeal of the right to reconsider a decision at some later date ought not to be taken as a statement that he thinks the decision was erroneous.

The last case I shall refer to on this question is that of *Bell* v. *Love* (1) in the Court of Appeal, where Baggallay L.J., after dealing at some length with *Hilton's* case (2) and the subsequent references to it, came to the conclusion that it had never been overruled and that it had been rightly decided. Lord Coleridge C.J. agreed with his conclusion and the substance of his judgment. Lindley L.J. did not mention *Hilton's* case. (2) Nor was it referred to in the House of Lords (3), where, however, the views of Baggallay L.J. were approved in several particulars and the decision was affirmed.

My Lords, I think some indirect support for the decision in *Hilton's* case (2) is also to be derived from the subsequent decisions of this House in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (4), and in *Butterley Co.* v. *New Hucknall Colliery Co.* (5) In the former of these cases Lord Macnaghten, in a passage which has often been cited, laid down in the most emphatic terms (6) the difficulty in most cases of finding in an enclosure Act or in a grant or a reservation language which will justify the letting down of the surface. Lord Davey in the same case (7) observed that if there was no provision for giving compensation for the injury done to the surface it was almost conclusive that the common law rule was intended to apply. The language used in these two cases certainly points in favour of the view that such a custom as is here in question would have been regarded by the noble Lords who took part in those decisions as being unreasonable.

My Lords, we now come to the present appeal. Nearly a century after the decision in *Hilton* v. *Granville (Earl)* (2) the validity of the same copyhold custom in the same manor of Newcastle-under-Lyme is again being raised. The respondents

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(1) 10 Q. B. D. 547.
(2) 5 Q.B. 701.
(3) (1884) 9 App. Cas. 286.
(4) [1906] A. C. 305.
(5) [1910] A. C. 381.
(6) [1906] A. C. 313.
(7) Ibid. 315.

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are plaintiffs in the action; and the appellants (who are defendants) are lessees from the Crown in right of the Duchy of Lancaster, and the Attorney-General of the Duchy. The respondents are owners in fee simple in possession of premises at Wolstanton upon which they have erected the Wolstanton Fire Station. These hereditaments were formerly of copyhold tenure held of the manor. They were enfranchised under the Law of Property Act, 1922, which, however, does not affect the present question. The mines and minerals under and near the respondents' premises at all material times have been and are part of the property of the Duchy.

The appellants have for some years past been mining and carrying away the mines and minerals in the vicinity of the respondents' fire station, and the latter alleged that the workings had caused subsidence of the surface and damage to the land and buildings. On March 14, 1938, they issued a writ claiming a declaration and an injunction. The appellants by their defences set up the custom to work the mines and minerals within the manor in the following terms:—

"His Majesty and His Predecessors in title have at all "material times been seised in demesne as of fee in right "of the Duchy of Lancaster of and in the manor of Newcastle-"under-Lyme and of and in the mines and minerals situate "within the said manor. His Majesty has and His Predecessors "in title at all times had as owners in right of the Duchy of "Lancaster of the said manor and of the said mines and "minerals and His and Their assigns tenants and licencees "have had the right to work and get the said mines and "minerals and for that purpose to make and execute all "necessary and proper diggings and excavations and other "works whether on the surface of or under any lands parcel "of the said manor doing no more than necessary for the "purpose aforesaid and making or and paying to the respective "tenants and occupiers of the surface of any lands damaged "thereby, a reasonable compensation and satisfaction when "demanded for and in respect of the user of the surface of "such lands in and about the working or getting of the said

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"mines and minerals and for and in respect of any damage "from time to time occasioned to the surface of the said lands "by anything done thereon in and about the working and "getting of the said mines and minerals but without making "compensation or satisfaction for or in respect of the said "surface on any other account and without making any "compensation or satisfaction for any damage occasioned to "any messuages dwellinghouses or other buildings that might "be erected on lands copyhold or formerly copyhold of the "said manor: (*a*) By reason of a custom existing in the said "manor from time immemorial that the owner or owners "for the time being of the said manor and of the said mines "and minerals and his or their assigns tenants and licencees "should so work the said mines and minerals. (*b*) By reason "of His Majesty and His Predecessors in title owners as "aforesaid of the said manor and of the said mines and "minerals and His and Their assigns tenants and licencees "having as of right from time immemorial so worked the "said mines and minerals. (*c*) By reason of His Majesty and "His Predecessors in title owners as aforesaid of the said "manor and the said mines and minerals and His and Their "assigns tenants and licencees having as of right and without "interruption for 60 or 30 or alternatively for 40 or 20 years "last before the commencement of the action so worked the "said mines and minerals."

They also relied on the presumption of a lost grant. It will be noted that the custom as pleaded is not confined to coal mines.

The respondents by their reply pleaded that in any event as a matter of law no such custom or prescriptive or other right as alleged by the appellants could be sustained or ought to be presumed as the same would be unreasonable.

On an application by the respondents Bennett J. made an order that the point of law raised by the reply of the plaintiffs, that is to say that in any event no such custom or prescriptive or other right as is alleged in the defences could or can be sustained or ought to be presumed as the same would be unreasonable, be set down for hearing and disposed of before the trial of the action pursuant to Order XXV., r. 2, of the Rules of the Supreme Court of Judicature.

The point of law was argued on May 24, 1939, before Farwell J., who stated that he was bound by the decision of the Queen's Bench in *Hilton* v. *Granville* (*Earl*) (1), and he accordingly held that the alleged custom was bad in law. It is admitted that if this be correct the claim by prescription must also fail.

The appellants appealed, and on July 4, 1939, the Court of Appeal (Clauson, Luxmoore and Goddard L.JJ.) affirmed the decision of Farwell J. The Court relied on the decision in *Hilton* v. *Granville* (*Earl*) (1), observing that the decision had stood unchallenged for three generations and must have affected persons residing in the manor. In those circumstances they thought it was the duty of the Court to hold fast to that which had so long ago been decided to be the local law.

My Lords, it has long been beyond dispute that to give validity to a custom it must possess three characteristics—it must be certain, reasonable in itself, and of immemorial origin. As regards the last circumstance, it means that the custom must have been in existence from a time preceding the memory of man, which has been fixed as meaning the year 1189, the first year of the reign of Richard I. (see for the explanation of this date the speech of Lord Blackburn in *Dalton* v. *Angus*. (2)) The Courts, however, have decided that in the case of an alleged custom it is sufficient to prove facts from which it may be presumed that the custom existed at that remote date and this presumption should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go. The presumption is rebuttable, and for instance can be rebutted by proof that the custom alleged could not have existed in the time of Richard I. The presumption itself in most cases is little more than a fiction. It was applied in the case of common law prescriptions (see *Dalton* v. *Angus* (2) and the judgment of Cockburn C.J. in *Angus* v. *Dalton* (3)), and in most cases no one supposed that the enjoyment really went back

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(1) 5 Q. B. 701.
(2) (1881) 6 App. Cas. 740, 811.
(3) (1877) 3 Q. B. D. 85, 105.

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to the year 1189. In the present case, however, I think we are called upon to assume in determining the point of law that the custom is being attacked only on the point that it is unreasonable, and we must therefore assume that in other respects it either has been or can be proved to be valid. We are therefore not directly concerned with the historical question whether any copyholds were or could have been in existence as early as the reign of Richard I., or whether any mines or minerals were worked in the manor at that early date by underground workings, or indeed whether any minerals thereunder were then known to exist. The cases I have cited show that it is a mistake to suppose that we must assume that the lord in or previously to the year 1189 granted the copyholds to his tenants with a reservation of his rights in the terms of the alleged custom. Prescription in the common law, which in many respects resembled a custom, was based upon the presumption of a grant which has been lost by process of time : *Rowles* v. *Mason* (1) ; *Lockwood* v. *Wood*. (2) It is plainly not so in the case of all customs as the old customs of gavelkind, of borough English, of having land devisable and various other customs sufficiently show. Some old statements to the contrary are erroneous : see *Gateward's* case (3) and *Tyson* v. *Smith*. (4) Indeed the speeches in this House in *Salisbury* (*Marquis*) v. *Gladstone* (5) proceed on the basis that it is not correct in the case of a custom to suppose that there has been a grant.

Nor is it necessary for those who allege a custom to show how it arose or might have arisen. The presumption of immemorial origin has been treated as covering a multitude of difficulties. The very numerous cases in which a copyhold custom has been established will not be disturbed by proof of the fact that copyholds in fact did not exist in the manors concerned in the year 1189. Another remarkable instance is afforded by the cases where it has been held that a custom to entail copyholds has been proved. It is a result not well founded in logic, since there could scarcely have been such a possibility before the statute *De Donis*, passed in the year 1285, long after the beginning of the reign of Richard I.: see Challis, Real Property, 2nd ed., pp. 27, 272; 3rd ed., 27, 300.

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(1) (1612) 2 Brownl. & Golds. 192.

(2) (1844) 6 Q. B. 50.

(3) (1607) 6 Co. Rep. 59 B. ; Co. Litt. 113 A.

(4) 9 A. & E. 406, 421.

(5) 9 H. L. Cas. 692.

My Lords, we are left with the question whether the alleged custom presumed to have originated in or prior to the year 1189 has been shown to have been a reasonable one with sufficient clearness to justify this House in overruling the decision in *Hilton's* case (1) over ninety years ago. I find it very difficult, if not impossible, to hold that a custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings is a reasonable custom, while accepting the view that a custom for the lord and his tenants of collieries to lay the rubbish in heaps on the copyhold lands near the pits, as in *Broadbent* v. *Wilks* (2), is unreasonable. In either case the lands of a copyholder might be made practically useless, although they would still be liable, to quote from Lord Cranworth in *Salisbury* (*Marquis*) v. *Gladstone* (3), "to pay their rents and "perform their stipulated services to the lord." Yet the authority of *Broadbent* v. *Wilks* (2) is acknowledged in that case. In my view, if the one custom is held bad as being of a very oppressive character and more probably founded in wrong and usurpation than in the voluntary consent of the copyholders of the manor, the same view ought to be taken of the other. That at any rate is the opinion I am disposed to adopt as to the custom for which the appellants are contending on the present appeal; but whether that be a correct view or not, I am confident that no sufficient ground has been shown for disturbing the decision in *Hilton* v. *Granville* (*Earl*) (1) in relation to this particular manor which has stood as the decision of a Court of high authority for so many years.

For these reasons, my Lords, I agree with the judgment of the Court of Appeal, and I am of opinion that this appeal should be dismissed with costs.

LORD ATKIN. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend and I concur in the result which he suggests.

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(1) 5 Q. B. 701.
(2) Willes, 360.
(3) 9 H. L. Cas. 692.

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LORD WRIGHT. My Lords, I also concur.

LORD ROMER. My Lords, I concur also.

LORD PORTER. My Lords, I concur.

Appeal dismissed.

Solicitors for Wolstanton, Ld.: *Hancock & Willis, for Ellis & Ellis, Burslem.*

Solicitor for Duchy of Lancaster: *Solicitor for the Duchy.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Joseph Griffith, Newcastle-under-Lyme.*

Distinguished. NEATH R.D.C. *v.* WILLIAMS. [1950] 2 All E.R. 625.

Distinguished. MINT *v.* GOOD. [1950] 2 All E.R. 1159.

Distinguished. MINT *v.* GOOD [1951] 1 K. B. 517

[HOUSE OF LORDS.]

H. L. (E.)* SEDLEIGH-DENFIELD . . . . . . APPELLANT;

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AND

April 18, 22, 23, 24; *June* 24.

O'CALLAGHAN AND OTHERS . . . . . RESPONDENTS.

Nuisance—Ditch—Culvert blocked on respondents' land—Overflow—Damage—Liability.

An occupier of land " continues " a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end when he has ample time to do so; and he " adopts " it if he makes any use of the erection or artificial structure which constitutes the nuisance.

On the respondents' land was a ditch in which at a later date was placed a pipe or culvert for carrying off rain water, the pipe not being laid by the respondents, or with their knowledge or consent, and thus by a trespasser. They, however, subsequently became aware, through their servants, of its existence and they in fact used it for the draining of their fields. To prevent leaves or other matter blocking the opening of the pipe a grating was placed, not at some little distance from its opening where it would have been effective, but on the top of the pipe itself, with the consequence that during a heavy rainstorm the pipe became choked with leaves, so that the water overflowed on to the appellant's premises causing damage in respect of which he claimed to recover damages:—

Held, that the respondents must be taken to have had knowledge of the existence of the unguarded pipe on their land, notwithstanding that it was placed there by a trespasser, and, consequently, they were responsible for the damage caused to the appellant.

Job Edwards, Ld. v. *Birmingham Navigations Proprietors* [1924] 1 K. B. 341 commented on.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal.

The appellant, the plaintiff in the action, was the owner and occupier of a house at Mill Hill. At the upper end of its garden was a ditch, and beyond the ditch a bank with trees upon it, the land beyond the ditch and bank belonging to the respondents. To the west of the respondents' plot was a block of flats called " Holcombe Court." Before 1934 the ditch, as an open course, continued along the northern edge of

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* *Present*: VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

Holcombe Court to a roadway running from north to south on the western side of Holcombe Court. In 1934 the then owners of Holcombe Court made an agreement with the Middlesex County Council by which the latter undertook to substitute a pipe or culvert in the line of the ditch. The county council made the culvert and covered the top of it with earth. To prevent the possibility of wood or leaves blocking the opening of the fifteen-inch pipe, it would have been proper practice to fix a grid or grating in the ditch a little way from the opening of the pipe, inasmuch as there were trees in the hedge, and sticks and leaves would be apt to fall into the ditch. The county council recognized the necessity for a grating, and provided one, but their workmen, instead of fixing it in the ditch a foot or two from the opening of the pipe or culvert, where it would intercept leaves and other refuse, placed it on the top of the culvert, where it was useless. The mouth of the culvert was on the respondents' land. Till April, 1937, the respondents' servants periodically cleaned out the ditch, but on April 20 of that year there was a very heavy rainstorm, the culvert became blocked with refuse, and the appellant's premises were flooded by water coming down the ditch, which could not get away through the fifteen-inch pipe, and in respect of this the appellant, who suffered substantial damage, sued the respondents. It was given in evidence that a grating or grid placed properly in the ditch would have intercepted debris, rubbish or foreign matter, and would have prevented such a blockage of the flow of water as caused the ditch to overflow. This evidence was accepted by the trial judge, who came to the conclusion that the ditch, unprotected by any grid or grating, was of the nature of a nuisance, giving the appellant, on damage being proved, a prima facie right to recover damages. But the respondents raised the defence that they never consented to the making of the culvert, and were, in fact, ignorant of its existence, evidence which Branson J. accepted. It appeared, however, that some one on behalf of the respondents had cleaned out the ditch twice a year, and in view of that their Lordships took the view that before the flooding complained of the respondents must be taken to have had knowledge of the existence of the unguarded culvert, and the damage which had been caused.

Branson J. held that as it was equally open to the present appellant and to the college to put the pipe right, the appellant could not complain of the failure of the college to abate a nuisance of which they had no notice, and which the appellant could himself have abated. On appeal, the Court of Appeal held that the college owed no duty to abate a nuisance not created by it, and of which it had no notice, and was not liable.

The plaintiff appealed to this House.

G. Granville Sharp, *H. V. Lloyd-Jones*, and *G. Avgherinos* for the appellant. The question is as to the liability of the respondents for damage caused by a nuisance on their land which was created there by a trespasser but of which they must be taken to have had knowledge. The dissenting judgment of Scrutton L.J. in *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors* (1) correctly stated the law on the subject as we contend that it is, namely, that a landowner who fails to abate a nuisance within a reasonable time after it has come, or ought to have come, to his knowledge, is responsible for resulting damage. Knowledge of a servant of the continuance of the nuisance must be imputed to the respondents: *Baldwin* v. *Casella.* (2) In *Barker* v. *Herbert* (3) Vaughan Williams L.J. said: "there can be no liability "upon the part of the possessor of land . . . . unless it is "shown either that he himself, or some person for whose "action he is responsible, created that danger . . . . , or "that he has neglected for an undue time after he became, or, "if he had used reasonable care, ought to have become, "aware of it, to abate or prevent the danger or nuisance." That exactly applies to the present case. In the same case Fletcher Moulton L.J. said (4): "in a case where the nuisance "is created by the act of a trespasser, it is done without the

(1) [1924] 1 K. B. 341.
(2) (1872) L. R. 7 Ex. 325.
(3) [1911] 2 K. B. 633, 636.
(4) Ibid. 642.

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"permission of the owner and against his will, and he cannot "in any sense be said to have caused the nuisance; but the "law recognizes that there may be a continuance by him of "the nuisance. In that case the gravamen is the continuance "of the nuisance, and not the original causing of it. An "owner of premises may have a duty to prevent the "continuance of the nuisance," and the Lord Justice went on to say that the knowledge of servants or agents must be imputed to the owner. Here the respondents knew or must be taken to have known that the offending thing was on their land, yet, notwithstanding, they left it there. In *Broder* v. *Saillard* (1) it was decided that the occupier of a house was liable for allowing on his premises an artificial work which caused a nuisance to his neighbour, even though it had been put there before he took possession. In *Lemman* v. *Webb* (2) this House decided that the owner of land which was overhung by trees growing on his neighbour's land was entitled, without notice, if he did not trespass on that neighbour's land, to cut the overhanging branches. In this case the appellant could not abate the nuisance without trespassing on the respondent's land. The latter's passive conduct makes them liable.

Richard O'Sullivan K.C. and *Ifor Lloyd* (for *Hubert Hull*, on war service) for the respondents. If a trespasser comes on to land and creates a nuisance the owner of the land is not liable unless he either adopts the act of the trespasser or does something in the nature of ratification after he becomes aware of its existence. Here the possibility of damage was never brought home to the respondents. In *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) the respondents were held not responsible for the act of a trespasser in creating a nuisance, or for the continuance of the nuisance. Similarly, it was so held in *Barker* v. *Herbert* (4) where Fletcher Moulton L.J. said (5): "an owner of premises may have a "duty to prevent the continuance of the nuisance, but it is

(1) (1876) 2 Ch. D. 692.

(2) [1895] A. C. 1.

(3) (1869) L. R. 4 C. P. 198.

(4) [1911] 2 K. B. 633.

(5) Ibid. 643.

"obvious that, just as, where the allegation is that he has "caused the nuisance, it must be proved that it was there by "his act or that of some one for whose action he is responsible, "so, where it is alleged that he is responsible for the continuance "of the nuisance it must be proved that it was continued by "his permission. He cannot be said to have permitted the "continuance of that which was not caused by him, and of "which he had no knowledge."

[VISCOUNT MAUGHAM. Thus, however long the nuisance remains, you say that the respondents are not liable.]

Yes, knowledge of the nuisance and its dangerous character are necessary to bring home liability.

G. Granville Sharp in reply. There was evidence of knowledge by the respondents of the existence of the nuisance. In any view it was incumbent upon them to find it out and prevent its continuance.

The House took time for consideration.

1940. June 24. VISCOUNT MAUGHAM. My Lords, this is an appeal from an order of the Court of Appeal affirming the decision of Branson J. which dismissed with costs the action of the plaintiff who is the appellant on this appeal. The respondents (the defendants) are the trustees of the St. Joseph's Society for Foreign Missions.

The facts are very clearly stated in the judgment of the Court of Appeal delivered by MacKinnon L.J. and substantially they are as follows.

The appellant is the owner and occupier of a house and garden called 1, Victoria Road, Mill Hill. To the north of his plot of land is a field which is owned by the respondents. On the southern edge of that field is a hedge, and to the south of the hedge there is a ditch. There was evidence that periodically this ditch had been cleaned out by the respondents' servants or helpers. Upon this, and upon the presumption that the area of a ditch alongside a hedge belongs to the owner of the hedge, there was ground for inferring that the area of the ditch was the property of the respondents, though no other evidence of their title was given. The trial judge dealt with the case on the basis that the area of the ditch was owned by the respondents. The Court of Appeal took the same view, and in the absence of evidence to the contrary, I think it is clear that we must come to the same conclusion.

To the west of the respondents' plot of land was another plot on which stands a block of flats called Holcombe Court. Before 1934 the ditch, as an open watercourse, flowing from east to west, continued along the northern edge of Holcombe Court, to a roadway called Lawrence Street, running from north to south on the western side of Holcombe Court. In 1934 the then owner of Holcombe Court made an agreement with the Middlesex County Council under which the latter undertook to substitute a pipe or culvert, 15 inches in diameter, in the line of the ditch along the north side of Holcombe Court. She had no right to do that, as the ditch was not her property, but was the property of the respondents. The county council, however, did the work, made the culvert, and covered the top of it with earth. At the western end, the culvert was connected with a manhole and sewer in Lawrence Street. The eastern end of the culvert was carried to a point about 2 feet to the east of the fence dividing the appellant's plot from the Holcombe Court plot. To prevent the possibility of wood, leaves or other refuse carried down by the stream, blocking the opening of the 15-inch pipe, it would have been proper practice to fix a grid or grating in the ditch a little to the east of the opening of the pipe, since there are a number of trees in the hedge and sticks and leaves would be apt to fall into the ditch. Moreover the county council recognized the necessity for a grating and provided one; but their workman instead of fixing it in the ditch some couple of feet from the opening of the pipe or culvert where it would intercept leaves and other refuse, placed it on the top of the culvert where it was completely useless. The mouth of the culvert is on land belonging to the respondents.

This state of things continued till April, 1937, the respondents' helpers or servants continuing periodically to clean out the ditch. On April 20, 1937, a heavy storm of rain occurred,

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the culvert became blocked with refuse and the appellant's premises were consequently flooded by water coming down the ditch which could not get away down the 15-inch pipe. The appellant suffered substantial damage.

Expert evidence was given on behalf of the appellant that a grating or grid placed properly in the ditch at a proper distance from the culvert would have intercepted debris, rubbish or foreign matter in the ditch and would have prevented such a blockage or stoppage of the flow of water as caused the ditch to overflow. This evidence was accepted by the learned judge who came to the conclusion, as I understand his judgment, that the ditch alongside the appellant's premises and running to the 15-inch culvert unprotected as the mouth of the culvert was by any grid or grating, was of the nature of a nuisance, giving to the appellant on damage being caused by the nuisance a prima facie right to recover damages. The Court of Appeal agreed.

Two points should here be mentioned. The first is that the respondents did not set up as a defence that the rainfall, admittedly a very heavy one, was so exceptional in amount that no reasonable man could have anticipated it or that it amounted to an act of God: see as to such a defence *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1) and *Greenock Corporation* v. *Caledonian Ry. Co.* (2)

The second point, which was raised as a defence, was that the respondents never consented to the making of the culvert as a substitute for a part of the ditch and were ignorant of its existence. It was, however, admitted by a witness for the respondents, one Brother Dekker, who at the time when the work was being done was the person responsible for cleaning the ditch, that he saw the work in progress at the time and that he assumed that it was being done with the consent of the respondents, but did not report the matter to his Superior. Branson J. accepted the contention that the respondents did not become aware of the construction of the culvert (with its unguarded entrance) until after the flood of April 20, 1937.

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(1) (1878) 9 Ch. D. 503.

(2) [1917] A. C. 556.

There is no doubt that the placing of the culvert was an act of trespass and that the respondents in the circumstances might not have become aware of it for some time after the work was completed; but nearly three years elapsed before the flood of April, 1937, and Brother Dekker or some other person was in charge of the ditch and cleaned it out on behalf of the respondents twice a year. It was an agricultural ditch of which the purpose was to act as a land drain and to take away surplus water from the adjoining fields of the respondents. An owner or an occupier of land constantly leaves such a matter as the cleaning out of ditches and drains on his land to persons employed by him to look after such things, and he would generally not expect, nor would he receive, detailed reports in regard to them. The culvert opening and the ditch were perfectly open to view for most of the time. In these circumstances I have formed the opinion in which I think all your Lordships agree that before the flood of April, 1937, the respondents must be taken to have knowledge of the ✓ existence of the unguarded culvert which for nearly three years had been the means by which the water coming down the ditch on the respondents' land had flowed away to the sewer in Lawrence Street. All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows or must be ✓ taken to know of it. An absentee owner or an occupier oblivious of what is happening under his eyes is in no better position than the man who looks after his property including such necessary adjuncts to it in such a case as we are considering as its hedges and ditches.

On this view as to the knowledge or presumed knowledge of the respondents the first question is as to their legal position in relation to the appellant; or to put the matter more precisely were they under a prima facie liability as regards the appellant if the ditch overflowed owing to the culvert becoming blocked with the result that the appellant's land suffered from an overflow of water from the ditch. The appellant contends that the respondents are liable for a private nuisance for which they are responsible. My Lords, I look upon the word

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nuisance as used in our law as a generic term. It is applied to damage resulting from water, smoke, smell, fumes, gas, noise, heat, electricity, disease-germs, trees, vegetation, and animals, as well as in other matters; and very little thought is sufficient to show that the ways in which damage from these things is caused and may be prevented are widely different. In my opinion the legal duty of the owner of land towards an adjoining owner may be very different in some of these cases, and may depend on very different considerations. In the present case we are dealing with the escape of water from an artificial watercourse on the respondents' land. The upper part of this watercourse consisted of an open ditch proved to have been nearly 40 inches deep and 20 inches wide capable, without overflowing, of carrying a considerable quantity of water if unobstructed; but at its lower end it led, as I have stated, though a brick contrivance into a culvert 15 inches in diameter, and it was not provided with any such grid as I have described, and the culvert was accordingly liable to be blocked up. In such a case and apart from a special defence which I will consider later, there is ample authority that the respondents are liable as for a nuisance in case of the flooding of the appellant's premises.

My Lords, I will begin by saying that in my opinion the principle laid down in *Rylands* v. *Fletcher* (1) does not apply to the present case. That principle relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damages caused to adjoining owners as the result of the ordinary use of the land: see *Rickards* v. *Lothian.* (2) On the other hand there is no doubt that if an owner of land for his own convenience diverts or interferes with the course of a stream he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow to his neighbours' land, and that he will prima facie be liable if such an overflow should take place: *Fletcher* v. *Smith* (3); as to which see *Greenock Corporation* v. *Caledonian Ry. Co.* (4)

(1) (1868) L. R. 3 H. L. 330.
(2) [1913] A. C. 263, 280.
(3) (1877) 2 App. Cas. 781.
(4) [1917] A. C. 556.

It would be a defence to prove that the overflow was due to a rainfall or a storm so exceptional that it should be regarded as an act of God; no doubt it would also be a defence, subject to a qualification I will mention later, to prove that the overflow was caused by the interference of a trespasser. The distinction between a natural use of land or of water flowing through it and the consequences of constructing some artificial work on land which alters the flow of water and causes damage to a neighbour has been drawn in a number of cases. The principle is not limited to the case of the diversion of a natural stream. I will cite in support of that proposition three cases; though in my view the present case does not differ from one in which a natural stream is interfered with.

The first is *Broder* v. *Saillard* (1), a decision by Sir George Jessel. The plaintiff and the defendant were adjoining occupiers, and the defendant's predecessor had erected a stable on a mound of earth heaped to a considerable height in close proximity to the plaintiff's house which caused the damp to percolate through the wall of that house and so to cause damage to it. It was held that the lessee in possession of the house where the artificial work was situate must be held responsible for the nuisance occasioned by the existence of that artificial work. The second case is that of *Hurdman* v. *North Eastern Ry. Co.* (2) It was the decision of Bramwell, Brett and Cotton L.JJ., delivered by the last named. Again it was a case of a heap or mound of earth raised by the defendant on his land causing rain water falling on that land to make its way into the adjoining house of the plaintiff. The decision in *Broder* v. *Saillard* was followed. (1) The principle was stated as follows: "If anyone by artificial "erection on his own land causes water, even though arising "from natural rainfall only, to pass into his neighbour's land "and thus substantially to interfere with his enjoyment, he "will be liable to an action at the suit of him who is so injured." The proposition was limited to liability for allowing things in themselves likely to be offensive to pass into a neighbour's property; and interference with his lights (not being ancient) was expressly excluded.

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(1) 2 Ch. D. 692.

(2) (1878) 3 C. P. D. 168, 173.

The third case is that of *R. H. Buckley & Sons, Ld.* v. *N. Buckley & Sons.* (1) That also was a decision of the Court of Appeal (A. L. Smith, Rigby and Vaughan Williams L.JJ.). The facts are a little complicated; but for the present purpose it is sufficient to say that a previous owner of land on the bank of a river, for the purpose of bringing water from the river to a mill belonging to him had constructed a goit or water-channel with a shuttle at the head of it to control the flow of water from the river. The shuttle was allowed by one of the predecessors in title of the defendants to get out of repair, and a flood in the river carried away the shuttle and thus flooded the plaintiff's lands and caused damage. It was held that the then owners of the land on which the shuttle was situate were prima facie bound not to allow the goit and shuttle to get into a dangerous state but must keep them in repair so as to prevent damage to the owners of the adjoining lands.

The main defence of the respondents was that the erection of the culvert with its lack of any proper contrivance for preventing it from becoming blocked with leaves and refuse was an act of trespass by the Middlesex County Council without the permission or knowledge of the respondents and that they are therefore free from liability. This defence requires careful consideration; and it is said to derive support from two decisions, the first being the case of *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) and the second the case of *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors.* (3)

The facts in both these cases are difficult fully to appreciate without a very careful study of the reports, and I do not like to take up your Lordships' time by an elaborate analysis of those facts. In *Saxby's* case (2) we have the advantage of a statement of the three counts of the declaration, and in each of the three it is pleaded that the defendants obstructed

(1) [1898] 2 Q. B. 608.
(2) (1869) L. R. 4 C. P. 198.
(3) [1924] 1 K. B. 341.

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and diverted the water in a certain watercourse to the plaintiff's damage. No such obstruction by the defendants was proved, and on this ground Channell B., on assize, directed a nonsuit. In the Court of Common Pleas, however, the plaintiffs obtained a rule nisi for a new trial on the ground of misdirection; and the report deals with the argument on this question. The question of nuisance was argued at length; but counsel for the defendants concluded by saying (1) that nothing short of evidence of an active obstruction of the stream by the defendants would sustain the declaration. The judgments as reported do not proceed on quite the same lines. Bovill C.J. said that the obstruction was not an act done by the defendants or by any one authorized by them nor was it an act done for their benefit or "adopted by them." He went on to show that in his view the defendants were not responsible for its continuance, and he concluded by holding that there was no evidence which could have warranted a verdict for the plaintiff. Byles J. apparently took the same view. The other two judges, Keating and Montague Smith JJ., however, were, as I think, rather more cautious. They said there was no evidence of a wrongful continuance by the defendants of a nuisance detrimental to a neighbour, and that on that ground there was nothing to render them liable in the action. It is impossible to regard this case as an authority for holding that if a nuisance is created by a trespasser's act, the occupier of the land is necessarily free from liability if damage is caused to an adjoining owner. On the contrary, I think it suggests that if the occupier "adopts" or "continues" the nuisance, he will be liable if damage is caused.

This is the view taken of the decision in *Barker* v. *Herbert*. (2) That was a case where the defendant was the owner in possession of a vacant house in a street with an area adjoining the highway. One of the rails of the area railing had been broken away by some boys, and there was therefore a gap in the railings. A child got through it and while climbing along inside the railings he fell into the area, and sustained

(1) L. R. 4 C. P. 201.

(2) [1911] 2 K. B. 633.

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injuries. The defendant had no knowledge of the removal of the rail which had taken place only three days before the accident, and he did not reside in the house. The case was tried with a jury who answered a number of questions, upon the answers to which the action was dismissed. The Court of Appeal agreed with this result. The case was treated as an action for nuisance. *Saxby's* case (1) was cited. Vaughan Williams L.J. after a full account of it, said that the effect of each of the judgments in that case was that to impose a liability upon the possessor of land in such a case, there must be either the creation of a nuisance by him or a continuance by him of a nuisance. Fletcher Moulton L.J. said (2): "In a case where the nuisance is created by the act of a "trespasser, it is done without the permission of the owner "and against his will, and he cannot in any sense be said "to have caused the nuisance; but the law recognizes that "there may be a continuance by him of the nuisance. In "that case the gravamen is the continuance of the nuisance, "and not the original causing of it." He added that the knowledge of servants and agents for whom the owner is responsible must be attributed to him, and that cases might arise in which his or their want of knowledge may be due to neglect of duty. Farwell L.J. (3) made remarks to precisely the same effect. I can find nothing to show that the observations I have referred to were confined to cases where there was a public nuisance.

The case, however, which was most relied on by the respondents was *Job Edwards, Ltd.* v. *Birmingham Navigations Proprietors.* (4) It was a case where refuse carried over the defendants' embankment and land on to the land of certain mine-owners but without the latter's consent, was found to be on fire. The defendants called on the mine-owners to extinguish the fire. They declined, but ultimately it was extinguished by the defendants without prejudice to the legal position. The mine-owners then brought an action for a declaration that they were not liable to pay any part of the cost of putting out the

(1) L. R. 4 C. P. 198.
(2) [1911] 2 K. B. 642.
(3) [1911] 2 K. B. 645.
(4) [1924] 1 K. B. 341.

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fire which was a large sum. It was held by Bankes L.J. and Astbury J. that the mine-owners were not liable since there was no public nuisance and no evidence that they either caused or continued the fire or were guilty of any negligence in relation to it. Scrutton L.J. dissented in a vigorous judgment in which a great many cases are considered, and he thought there should be a new trial. He approved the statement of the law in Salmond's Law of Torts, 5th ed., 1920, pp. 258-265: "When "a nuisance has been created by the act of a trespasser or other-"wise without the act, authority, or permission of the occupier, "the occupier is not responsible for that nuisance unless, with "knowledge or means of knowledge of its existence, he suffers "it to continue without taking reasonably prompt and efficient "means for its abatement." In more recent editions the learned editor cites *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors* (1) as authority for the different view; but he cites the case with doubts: 9th ed., p. 246, and see note C.

The case of internal fires on large refuse heaps may require special consideration, but I think this statement of the law is correct at any rate in the case of a nuisance such as the one which is being considered on this appeal. The view of the facts taken by the other two Lords Justice, namely, that there was no evidence that the plaintiffs either caused or continued the nuisance or were guilty of any negligence in relation to it, if it was correct, justified their conclusions; but with the greatest respect I cannot agree with some of the statements which are to be found in the judgment of Bankes L.J., and in particular I cannot agree with the distinction he draws between the duty of an occupier in the case of a public nuisance existing on his land and his duty if he allows a private nuisance on his land to continue so as to cause damage to an adjoining owner (2). I am indeed not quite sure what conclusions the Lord Justice arrived at; for he stated that he was, of course, confining his observations to the case "where the possessor of "the land on which the nuisance exists is entirely innocent of "either creating or continuing it." That was not, I think, the case in *Attorney-General* v. *Tod-Heatley* (3), in which the

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(1) [1924] 1 K. B. 341.
(2) Ibid. 350–1.
(3) [1897] 1 Ch. 560.

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defendant with knowledge permitted his land to become a public nuisance, and (as A. L. Smith L.J. observed (1)) was maintaining his property so as to be a public nuisance. Bankes L.J. relied, in support of his view that the standard of duty required of the occupier of land in the case of injury resulting from a private nuisance was very different from that required if a public nuisance was created, on the common law right of abatement which he said pointed to the conclusion that in some cases the law did not afford any other remedy. I do not find it easy to understand this. Abatement exists in most, but not in all, cases of private nuisance. It also generally exists in the case of a public nuisance in so far as it causes special injury to a private individual. For the present purpose, however, the part of the judgment which I am venturing to doubt is his remark (2) that "the mere refusal or neglect to "remove the nuisance, if it be a private nuisance, does not in "my opinion constitute a default." If that were true an occupier might allow a private nuisance of a most serious character to continue to exist on his land for, say, twenty years without making any effort to stop it. This seems to be the effect of a passage in Clerk and Lindsell on Torts, 7th ed., 1921, p. 419, quoted by Astbury J. (3); but for my part, following Scrutton L.J., I prefer the proposition stated in Salmond on Torts which I have cited above. See also Clerk and Lindsell's Torts, 9th ed., 1937, p. 476.

The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g., by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words "continues or "adopts" are defined. In my opinion an occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions.

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(1) [1897] 1 Ch. 570.
(2) [1924] 1 K. B. 341, 352.
(3) [1924] 1 K. B. 365.

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Those statements, I think, have the authority of the learned judges in *Barker* v. *Herbert* (1), of three of the judges in *Saxby's* case (2), of Sir George Jessel in *Broder* v. *Saillard* (3) of the three judges in *R. H. Buckley & Sons* v. *N. Buckley & Sons* (4), of Scrutton L.J. in *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors* (5), and of a number of other decisions which he refers to.

My Lords, in the present case I am of opinion that the respondents both continued and adopted the nuisance. After the lapse of nearly three years they must be taken to have suffered the nuisance to continue; for they neglected to take the very simple step of placing a grid in the proper place which would have removed the danger to their neighbour's land. They adopted the nuisance for they continued during all that time to use the artificial contrivance of the conduit for the purpose of getting rid of water from their property without taking the proper means for rendering it safe.

For these reasons I am of opinion that this appeal should be allowed for damages to be assessed with costs here and below (the costs here being those allowed in the case of a pauper appellant), but the appellant must be left to bear the costs he has been ordered to pay to the defendant Lilian Hillman against whom the action was dismissed and as regards which order there has been no appeal.

LORD ATKIN. My Lords, I do not propose to recapitulate the facts in this case which have been sufficiently stated in the opinion just delivered by the noble Lord on the woolsack. I treat it as established that the entrance to the offending pipe when laid was on the defendants' land abutting on the premises occupied by the plaintiff. I agree with the finding of the learned judge, accepted by the Court of Appeal, that the laying of a 15-inch pipe with an unprotected orifice was in the circumstances the creation of a nuisance or of that which would be likely to result in a nuisance. It created a state of things from which when the ditch was flowing in full stream an obstruction might reasonably be expected in the pipe, from which obstruction flooding of the plaintiff's ground might reasonably be expected to result: though I am not satisfied that granted this reasonable expectation of obstruction it would be necessary for the plaintiff to prove that the particular injury was such as reasonably to be expected to result from the obstruction. Now, if the defendants had themselves laid the pipe in the manner described, I have no hesitation in saying that the plaintiff once he had suffered damage from flooding so caused, would have had a good cause of action against them for nuisance. It is probably strictly correct to say that as long as the offending condition is confined to the defendant's own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance has been caused. I should regard the case on this hypothesis as having the same legal consequences as if the defendants, instead of laying a pipe, had placed an obvious obstruction in the course of the ditch. The question here is what is the legal position if such an obstruction is placed by a trespasser. In the present case I consider it established that the defendants by their responsible agents had knowledge both of the erection of the pipe, of the reasonable expectation that it might be obstructed and of the result of such obstruction, and of its continued existence in the condition complained of, since it was first placed in position. Brother Dekker, a member of the community, was in charge of the defendants' farming operations, and obviously represented the defendants in this matter so far as is relevant. He had doubtless no authority to consent to a trespass and probably not to incur any appreciable expense in remedying it; but the defendants obviously had to rely upon him to report to them what was found on the farm likely to be injurious to them or their neighbours.

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(1) [1911] 2 K. B. 633, 642, 645.
(2) L. R. 4 C. P. 198.
(3) 2 Ch. D. 692.
(4) [1898] 2 Q. B. 608.
(5) [1924] 1 K. B. 341.

In this state of the facts the legal position is not I think difficult to discover. For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance I think that nuisance is sufficiently defined as a wrongful interference

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with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself.) The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word "use." This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance. We may eliminate in this case "caused." What is the meaning of "continued"? In the context in which it is used "continued" must indicate mere passive continuance. If a man uses on premises something which he found there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself in continuing to bring into existence the noise, vibration, etc., causing a nuisance. Continuing in this sense and causing are the same thing. It seems to me clear that (if a man permits an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it, he is permitting the nuisance to continue) in other words he is continuing it. The liability of an occupier has been carried so far that it appears to have been decided that, if he comes to occupy, say as tenant, premises upon which a cause of nuisance exists, caused by a previous occupier, he is responsible even though he does not know that either the cause or the result is in existence. This is the decision in *Broder* v. *Saillard* (1) where the defendant had taken the tenancy of premises the stables of which were erected upon an artificial mound of earth which adjoined the plaintiff's house, and into which rain and the drainage from the stables penetrated and so caused the plaintiff's wall to be damp. Jessel M.R. said (2): "The made earth was the chief cause of the mischief, perhaps "not the sole cause. That being so I think both on principle "and authority the lessee in possession of the house where "the artificial work is ought to be responsible for the nuisance

(1) 2 Ch. D. 692. (2) Ibid. 700.

"occasioned by the existence of that artificial work." It is to be noted that the mound of earth had not been made by the defendant or by any one for whose acts he was responsible. It may be remarked, however, that the learned judge attributed this dampness as being due probably to the water used in the stables and possibly the defendant on that ground may be said to have caused the nuisance. The case is referred to in *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors* (1), by both Bankes L.J. (2) and Scrutton L.J. (3) as a case where liability was imposed because the occupier had taken the land with an artificial nuisance on it, and as Bankes L.J. said was liable for its continuance. If nothing more than this can be said then such cases impose very stringent liabilities: for in *Broder* v. *Saillard* (4) knowledge of the tenant was negatived. x Similarly in *Humphries* v. *Cousins* (5), a drain which began on the defendant's premises passed under other houses and received their drainage and then returned under the plaintiff's premises and passed beneath the plaintiff's house. The return drain beneath the defendant's premises was decayed and allowed drainage to escape which passed into the plaintiff's premises. The defendant was ignorant even of the existence of the return drain. He was held liable for nuisance. It is probable, however, that the principle of *Rylands* v. *Fletcher* (6) though not referred to in the case would justify the decision, as suggested in Winfield on Torts at p. 420. It is possible that the question how far a person is liable for injury to a neighbour's land from a cause emanating from his own land where he himself is ignorant of the cause or effect has still to be determined: though I cannot but think that the reference to this liability as due to the maxim "sic utere tuo" which appears to be expressly affirmed in this House in *St. Helen's Smelting Co.* v. *Tipping* (7) affords a clue to the problem. See the direction of Mellor J. at p. 644 approved by the judges at p. 649, and expressly approved by the Lord Chancellor (Lord Westbury), Lord Cranworth and Lord Wensleydale.

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(1) [1924] 1 K. B. 341.

(2) Ibid. 351.

(3) Ibid. 355.

(4) 2 Ch. D. 692.

(5) (1877) 2 C. P. D. 239.

(6) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

(7) (1865) 11 H. L. Cas. 642.

In the present case, however, there is as I have said sufficient proof of the knowledge of the defendants both of the cause and its probable effect. What is the legal result of the original cause being due to the act of a trespasser? In my opinion the defendants clearly continued the nuisance for they come clearly within the terms I have mentioned above, they knew the danger, they were able to prevent it and they omitted to prevent it. In this respect at least there seems to me to be no difference between the case of a public nuisance and a private nuisance, and the case of *Attorney-General* v. *Tod-Heatley* (1), is conclusive to show that where the occupier has knowledge of a public nuisance, has the means of remedying it and fails to do so, he may be enjoined from allowing it to continue. I cannot think that the obligation not to "continue" can have a different meaning in "public" and in "private" nuisances. If an individual could have proved special damage caused by the nuisance in the *Tod-Heatley* case (1) he could surely have recovered damages. The only express authority for the contrary is what I consider to be the dicta of Bankes L.J. in *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors* (2), which coming from that learned lawyer demand careful consideration. The learned Lord Justice, while maintaining the obligation of an occupier for continuing a nuisance, finds in the case of a private nuisance where a nuisance has been caused by a trespasser that the occupier is not liable unless it is allowed to continue by his act or default: and that the mere refusal or neglect to remove the nuisance is not a default. In the Lord Justice's opinion the only right of the person injured in such a case is to enter upon the occupier's land and abate the nuisance: and this remedy was given because it was recognized that in some cases the person injured would have no other remedy. My Lords, I cannot believe that the injured person in such cases is left by the law so defenceless. The remedy of abatement inevitably tends to disorder, and has been on many

(1) [1897] 1 Ch. 560.

(2) [1924] 1 K. B. 341.

occasions spoken of with discouragement. It affords no remedy at all for damage actually done: it never was intended for any purpose but to prevent repetition: or in some cases it may be to prevent damage before it occurred as in the case of overhanging eaves: *Penruddock's* case (1) where Popham C.J. on error to the King's Bench from the Common Pleas held that the plaintiffs might abate the nuisance before any prejudice (101 (*b*)). With all respect I cannot agree with these dicta. They do not represent the decision of the Court, for Scrutton L.J. dissented, while Astbury J. decided in favour of the defendants on the ground that between the date when the defendants first knew of the danger and the writ the parties had been in negotiation and the time had not elapsed at which the defendants could be said to have permitted the nuisance to continue. The decision in *Job Edwards, Ld.* (2), was said to follow the decision in *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) It is difficult from the report to ascertain precisely the facts. But it appears that the defendants were proprietors of a stream called Todd's Brook and that they had diverted a portion of the stream by a new cut through which water flowed to the works of both the plaintiff and one Welch. Welch, while occupying both works, erected a weir in the new cut which impeded the flow into the works which the plaintiff ultimately acquired. When the plaintiff came into possession of his works he removed the weir, but later someone unknown restored the weir. The case was tried before Channell B. and a jury at the Chester Assizes and the judge directed a non-suit on the ground that there was no evidence of obstruction by the defendants. The Court of Common Pleas discharged a rule for a new trial. Bovill C.J. said that there might have been something for the jury if it had been shown that the defendants had sanctioned or approved of the act of Welch or had derived any benefit from it, but nothing of the kind appeared. I do not understand this for it is expressly stated that it did not appear by whom the second obstruction which was the one complained of

(1) (1598) 5 Co. Rep. 100.
(2) [1924] 1 K. B. 341.
(3) L. R. 4 C. P. 198.

had been replaced. The other judges concurred resting entirely, as far as the judgments of Keating and Montague Smith JJ. are concerned, on the special facts of the case. Keating J. addressed himself, following the Chief Justice, to the continuance by the defendants of the obstruction by Welch. It looks from the pleadings as though the three counts of the declaration averred only an obstruction by the defendants themselves, and made no reference to continuing or permitting an obstruction. If so the decision can be explained. In any case I think that this decision can only be supported on the special facts of that case. If the opinions of the judges are to be treated as of general application, in my opinion they are contrary to principle and the decision must be overruled. I think therefore that in the present case the plaintiff established the liability of the defendants to him, and that the appeal should be allowed. The orders of the learned judge and the Court of Appeal should be set aside and judgment entered for the plaintiff for damages to be assessed. I see no reason for making any special order as to the costs ordered to be paid by the plaintiff to Hillman the second defendant against whom he failed. The respondents should pay to the plaintiff his costs of the action and of the appeal to the Court of Appeal and to this House so far as appropriate to a pauper appeal.

LORD WRIGHT. My Lords, my noble and learned friend Lord Maugham has stated the facts of this case. There is thus no need for me again to detail them, as they are now so fully and adequately before your Lordships.

The Court of Appeal, in affirming the decision of Branson J., decided this case on a rule of law which they derived from *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors.* (1) They stated this rule to be that where a private nuisance has been created upon a man's land by a trespasser, he is not liable for it, and that in case of such a private nuisance, created without his authority by another, mere failure on his part or even refusal to remove the nuisance, does not involve him in liability for its results. I should infer from the judgment of the Court of Appeal which MacKinnon L.J. delivered, that the Court of Appeal were proceeding rather on the basis of the authority of *Job Edwards* case (1) and also of *Saxby* v. *Manchester, Sheffield & Lincolnshire Ry. Co.* (2) than upon any opinion of their own as to the correctness of these decisions. The Court acceded without demur or discussion to a request on behalf of the appellant for leave to appeal to this House.

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(1) [1924] 1 K. B. 341.

In my opinion, for reasons which I shall briefly explain, I think the appeal should succeed.

If it were merely a question of the physical conditions no one would doubt that a case of private nuisance was established. The interposition of the pipe as the means of carrying the water from the ditch in place of the former open watercourse was not in itself objectionable. The trouble was that no protecting grid was put in place, and there was nothing to prevent the pipe getting choked. There was thus the risk of a flood, which might spread, as in fact happened, to the appellant's premises, causing damage which in the actual result was considerable. The structure of the orifice of the pipe was on the respondents' land. If the work had been done by or on behalf of the respondents, the conditions requisite to constitute a cause of action for damages for a private nuisance, would be beyond question complete. I do not attempt any exhaustive definition of that cause of action. But it has never lost its essential character which was derived from its prototype, the Assize of Nuisance and was maintained under the form of action on the case for nuisance. The Assize of Nuisance was a real action supplementary to the Assize of novel disseisin. The latter was devised to protect the plaintiff's seisin of his land, and the former aimed at vindicating the plaintiff's right to the use and enjoyment of his land. The Assize became early superseded by the less formal procedure of an action on the case for nuisance, which lay for damages. This action was less limited in its scope, because whereas the Assize was by a freeholder against a freeholder, the action lay also between possessors or occupiers of land. With

(1) [1924] 1 K. B. 341.

(2) L. R. 4 C. P. 198.

possibly certain anomalous exceptions, not here material, possession or occupation is still the test. In *Cunard* v. *Antifyre* (1) Talbot J. succinctly defined private nuisances as interferences by owners or occupiers of property with the use or enjoyment of neighbouring property. "Property" here means land and should be amplified to include rights over or in connection with it. "Occupiers" may in certain cases be used with a special connotation. The ground of responsibility is the possession and control of the land from which the nuisance proceeds. The principle has been expressed in the maxim "Sic utere tuo ut alienum non laedas." This, like most maxims, is not only lacking in definiteness but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability. This may be illustrated by *Bradford Corporation* v. *Pickles*. (2) Even where he is liable for a nuisance, the redress may fall short of the damage, as, for instance, in *Colls* v. *Home and Colonial Stores* (3), where the interference was with enjoyment of light. A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean. Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances. But where, as here, a plaintiff is damaged by his land being flooded, the facts bring it well within the sphere of nuisance. Such a case has a certain similarity with those to which the rule of *Rylands* v. *Fletcher* (4) applies, but there are obvious differences in substance. There are indeed well marked differences between the two juristic concepts. This case has therefore properly been treated as a case of nuisance. It has affinity also with a

(1) [1933] 1 K. B. 551, 557.
(2) [1895] A. C. 587.
(3) [1904] A. C. 179.
(4) L. R. 3 H. L. 330.

claim for negligence, because the trouble arose from the negligent fitting of the grid. But the gist of the present action is the unreasonable and unjustified interference by the defendant in the user of his land with the plaintiff's right to enjoy his property. Negligence, moreover, is not a necessary condition of a claim for nuisance. What is done may be done deliberately, and in good faith and in a genuine belief that it is justified. Negligence here is not an independent cause of action but is ancillary to the actual cause of action, which is nuisance.

I have adverted to these general principles, disregarding for the moment the allied but different case of a public nuisance, in order to deal with the difficulty emphasized by the decision of the Court of Appeal. This difficulty is that the respondents did not create the offending structure and in that sense create the nuisance. It was created by the Middlesex County Council, which was or has been treated as being a trespasser. I am not clear whether the Court of Appeal held that the respondents were not liable for it at all, or whether they held merely that they were not liable to do anything about it, and were not bound to remove it.

Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware if it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that with ordinary care in the management of his property he should have realised the risk of its existence. This principle was affirmed in *Barker* v. *Herbert*. (1) That was the case of a public nuisance constituted by a defective railing dividing the area of the defendant's house from the highway. A boy, playing, fell and was injured, and claimed damages. Though the nuisance was a public nuisance, and though a public nuisance in many respects differs or may differ from a private nuisance, yet there is in my opinion no difference, in the respect here material, which is that if the defendant did not create the nuisance he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became or should have become aware of it. The public nuisance in that case was created on the defendant's property and was in that respect more analogous to a private nuisance than a public nuisance committed on the highway or a common. The jury found that the gap in the railings had been created by trespassers and that the defendant, who was not living in the house which was vacant at the time, did not know of it at the time of the accident, and that such a time had not elapsed between the creation of the gap and the accident, that with reasonable care he should have known of it. On these findings the Court of Appeal (Vaughan Williams, Fletcher Moulton and Farwell L.JJ.) unanimously found that the defendant was not liable. Fletcher Moulton L.J. thus admirably stated the law (2): "In a case where the "nuisance is created by the act of a trespasser, it is done "without the permission of the owner and against his will, "and he cannot in any sense be said to have caused the "nuisance; but the law recognizes that there may be a

(1) [1911] 2 K. B. 633. (2) Ibid. 642.

"continuance by him of the nuisance. In that case the gravamen "is the continuance of the nuisance, and not the original causing "of it. An owner of premises . . . . cannot be said to have "permitted the continuance of that which was not caused by "him, and of which he had no knowledge; and when I say of "which he had no knowledge, of course I include the knowledge "of the servants and agents for whom he is responsible. If "they have knowledge of the nuisance, their knowledge must "be attributed to him. I also realise that cases may arise in "which his or their want of knowledge may be due to neglect "of duty." Farwell L.J., in dealing with the contention that the landowner's duty was absolute, said (1): " The proposition "put forward is that, in the case of such an ordinary user of "land" [as having an area to his house fenced off the street by railings] " the occupier of the premises is under an absolute "obligation at all times and in all possible circumstances, for "the argument made no exception even as regards the act of "God or the King's enemies, to have and maintain a sufficient "fence. In my opinion a landowner is not liable for a nuisance "caused, not by his own action, but by something done by "another person against his will, subject to the qualification "that he may become liable if he permits it to continue "and fails to abate it within a reasonable time after it has "come, or ought to have come, to his knowledge." These judgments, and equally that of Vaughan Williams L.J., seem to me to express both good law and good sense. It is to be noted that there is nowhere any suggestion that the character of the landowner's liability, when he is actually responsible for a nuisance not caused by himself, is in any way different from his liability if he has caused the nuisance, nor can I see why there should be any difference. Farwell L.J. (2) referred to *Tarry* v. *Ashton* (3), and obviously preferred the judgment of Blackburn J. to that of the other members of that Court. That was also a case of a private action for a public nuisance. The plaintiff had been injured by a heavy lamp suspended from the defendant's premises over the public footway, which fell upon him. The lamp had been erected by the defendant's predecessor, but when the defendant came into possession, knowing that the lamp was old, he employed a competent contractor to examine it and put it into repair. The contractor negligently failed to do so. Blackburn J. (1) decided the case on the ground that, as the defendant knew that the lamp might be getting out of repair, it was his duty to make the lamp reasonably safe: he entrusted that duty to an independent contractor, who had failed to do the work: hence he was, in Blackburn J.'s judgment, liable for the negligence of the independent contractor, as much as if he had been his servant on the principles which Lord Blackburn again enunciated in *Dalton* v. *Angus*. (2) This was the explanation of *Tarry* v. *Ashton* (3) expressed by Cockburn C.J., Mellor and Field JJ. in *Bower* v. *Peate*. (4) But in addition Blackburn J. in *Tarry* v. *Ashton* (5) stated the same principles as those subsequently enunciated in *Barker* v. *Herbert* (6), as to liability for a nuisance not caused by the defendant. "If he did know "of the defect," he said, "and neglect to put the premises in "order, he would be liable." These were cases of public nuisances in which the plaintiff was suing as for damage of a special and particular character caused to him. But in the material respects I can see no difference between a claim for private nuisance and a claim for private damage resulting from a public nuisance. The same principle was reaffirmed by the Court of Appeal in the case of *St. Annes Well Brewery Co.* v. *Roberts* (7), where the nuisance was a private nuisance and was again applied by Luxmoore J. in *Wilkins* v. *Leighton* (8), also a case of private nuisance. *Penruddock's* case (9), is an old authority which clearly involves the principle that to continue the nuisance with knowledge is a new wrong, separate from the original creation of the nuisance. The phrase "continuing the nuisance" is used in this connection

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(1) [1911] 2 K. B. 645.

(2) Ibid. 646.

(3) (1876) 1 Q. B. D. 314.

(1) 1 Q. B. D. 319.
(2) (1881) 6 App. Cas. 740, 829.
(3) 1 Q. B. D. 314.
(4) (1876) 1 Q. B. D. 321, 329.
(5) 1 Q. B. D. 314, 319.
(6) [1911] 2 K. B. 633.
(7) (1928) 140 L. T. 1. ✓
(8) [1932] 2 Ch. 106.
(9) 5 Co. Rep. 100 B.

in *Reg.* v. *Watts.* (1) The modern cases have defined what is meant by "continuing."

In these cases the plaintiff failed because he did not establish that the defendant either knew or ought to have known. In the present case it is in my opinion clear on the facts stated by my noble and learned friend Lord Maugham that the respondents, by their servant, knew or at least ought to have known of the nuisance. On the law, as I have accepted it, the respondents' responsibility would seem to follow. But the Court of Appeal, like Branson J., held that this was not so. I must accordingly refer to the two cases on which this conclusion seems to be based. The earlier is *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) I confess I have found this case most difficult to understand. Channell B. had nonsuited the plaintiff, who obtained a rule nisi for a new trial. The rule was discharged, but I am not clear on what ground. Nor am I clear what the precise facts were. Keating and Montague Smith JJ. both rested their decision on the particular facts of the case. They thought that there was no evidence of the wrongful continuance of a nuisance which had been created by a third party. Bovill C.J. and Byles J. seem to say that the defendants not having created the nuisance were not bound to remove it. The case was discussed by Vaughan Williams L.J. in *Barker* v. *Herbert* (3), who said (4): "The effect of each of the judgments is that, to impose a "liability upon the possessor of land in such a case, there must "be either the creation of a nuisance by him or a continuation "by him of a nuisance." On this understanding of the case, Vaughan Williams L.J. seems to have thought that the case fell into line with the principles which he and his brethren had expounded in *Barker* v. *Herbert.* (3) The non-suit may perhaps have been justified by the form of the pleadings. I cannot myself derive any principle from the decision and I should have regarded it as one of those cases which should never have been reported and which fulfil no function but to embarrass judges, were it not that in *Job Edwards, Ld.*, case (1) the members of the Court of Appeal all treated it as an authority deciding, in the words of Scrutton L.J. (2) that "an owner or occupier is "not bound to remove a nuisance which neither he nor those for "whom he is responsible created, even though by reasonable "means he could abate it." Bankes L.J. and Astbury J., as I read their judgments, on this basis held that in the case of a private nuisance the landowner has no responsibility and is not bound either to remove it or to pay damages in respect of it. Bankes L.J. distinguished the case of a public nuisance which was the subject of the decision in *Attorney-General* v. *Tod-Heatley* (3) where there was a nuisance of filth put on the plaintiff's land by trespassers. The defendant did not cleanse it but said that anyone affected might enter and abate the nuisance. The Court of Appeal held that the plaintiff was entitled to an injunction though a declaration to that effect was in the circumstances sufficient. One of the reasons which Bankes L.J. gives for his distinguishing it is that the common law gave a right to enter on the land and do what was necessary to abate it. On that footing the existence of a right to abate, however difficult and inconvenient to exercise, would seem to exclude a claim for damages in any action for nuisance. I cannot agree. Damage was an essential element in the action on the case for nuisance. Thus Lord Macnaghten observed with reference to the right to prevent interference with light in *Colls* case (4). "This right in early times was vindicated by "an action on the case for nuisance—*Batens* case (5)—in "which damages might be recovered and judgment had for "removal or abatement of the nuisance." He clearly treated the two judicial remedies as cumulative, not exclusive. It was, however, added in *Batens* case (6) that if the party aggrieved enter and abate the nuisance he shall not have an action nor recover damages. This was for technical reasons now obsolete. That was a case of a private nuisance. I cannot see any relevant distinction for this purpose between one nuisance and another, nor can I see any reason why there should be a different rule in this respect according as the action is for a private nuisance or is for a private injury from a public nuisance. Again Bankes L.J. treated the case before him as one in which both parties were entirely innocent and asked why the one in whose interest the expenditure was required in order to abate a danger to himself should not be the person to bear the necessary expenditure. The Lord Justice was referring to the special form in which the question came before the Court, the precise issue being whether owners of the land on which the nuisance had arisen were liable to pay any part of the cost of abating it. That involved in substance the question whether they were liable for it in any sense. I should have thought the true answer was that given by Scrutton L.J. in a powerful dissenting judgment. He applied the rulings of *Barker* v. *Herbert* (1) and held that the occupier was liable if, with knowledge or means of knowledge, he suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement. Scrutton L.J. also expressed the view that for this purpose there was no difference between a private nuisance and a private action for a public nuisance. He found *Saxby's* case (2) unsatisfactory. He was further of opinion that a right to abate a nuisance does not exclude a right to bring an action for damage caused by the nuisance. He cited as authorities for this proposition *Penruddock's* case (3); *Lemmon* v. *Webb* (4) per Kay L.J.; *Smith* v. *Giddy*. (5) On this point no authority was cited by Bankes L.J. in support of the view taken by him except *Saxby's* case. (2) Scrutton L.J. quoted with approval a passage from Salmond's Law of Torts, 5th ed., p. 260, s. 71, sub-s. 4. It is unnecessary here to repeat the passage as it is set out by my noble and learned friend Lord Maugham in his opinion. I concur with him in also approving of it.

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(1) (1702) 1 Salk. 357.
(2) L. R. 4 C. P. 198.
(3) [1911] 2 K. B. 633.
(4) Ibid. 640.

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(1) [1924] 1 K. B. 341.
(2) Ibid. 358.
(3) [1897] 1 Ch. 560.
(4) [1904] A. C. 179, 186.
(5) 9 Co. Rep. 54 A.
(6) Ibid. 55B.

I agree with Scrutton L.J.'s opinion on all the points I have mentioned. I think the view of Bankes L.J. was influenced or decided by a failure to appreciate what was meant by the term "continuing" a nuisance, the true meaning of which was explained in *Barker* v. *Herbert* (1) in the quotation I have given above. The logical result of the view of Bankes L.J. would be that there was no cause of action at all, if both parties could be described according to his view as entirely innocent. All it seems that the injured party would have would be a right to enter and abate. I cannot accept this conclusion. No doubt there may be a common law right to abate extrajudicially, but that is a right which involves taking the law into a man's own hand and which is much to be discouraged particularly if it involves entering on the other party's land. In any case it cannot exclude a claim for damages for detriment suffered. As to the suggested hardship, both parties may be innocent of the creation of the nuisance, but in the circumstances postulated in *Barker* v. *Herbert* (1) and the other similar decisions, the landowner cannot be deemed to be innocent of the continuance of the nuisance. He is responsible on that footing for the condition in which he keeps or uses the land, and cannot justify doing so to the detriment of his neighbour.

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(1) [1911] 2 K. B. 633.
(2) L. R. 4 C. P. 198.
(3) 5 Co. Rep. 100 B.
(4) [1894] 3 Ch. 1, 24.
(5) [1904] 2 K. B. 448.

In my opinion the appeal should be allowed.

LORD ROMER. My Lords, at the trial of this action before Branson J. the following facts were established: (1.) that the ditch at the north end of the appellant's garden was the property of the respondents; (2.) that the culvert laid down by the Middlesex County Council extended for some 2 or 3 feet into that portion of the ditch; (3.) that the insertion of that culvert without a proper guard against its getting blocked by the debris which would be likely to be washed down the ditch was an improper act that was likely at some time or another to cause a nuisance; (4.) that Brother Dekker, who was the person in charge of the respondents' farm, on their behalf saw the culvert being laid; (5.) that the ditch had originally been dug in the ordinary course of the user of the respondent's

(1) [1911] 2 K. B. 633.

fields that adjoined it in order to provide for the surface drainage of those fields ; (6.) that Brother Dekker was in the habit of cleaning out the ditch by the removal of any rubbish that might obstruct the regular flow of water. He did this, he said, to get the water away and prevent flooding. It would seem to follow from this last-mentioned fact that, if Brother Dekker thought about the matter at all, he must have realised that unless rubbish were prevented from entering the culvert, from which he would not be able to remove it, there would, or might be, such an accumulation in the culvert as to prevent the water in the ditch from passing through it and so to cause a flood.

In these circumstances the question to be decided is whether the respondents can be held liable for the damage caused to the appellant by the floods that took place in April and in November 1937, which were without question due to the accumulation in the culvert of rubbish that would not have been there had a proper grid been provided in the respondents' ditch.

My Lords, I should have thought that, consistently with well-established principles of law, this question only permitted of an answer in the affirmative. An owner or occupier of land must so use it that he does not thereby substantially interfere with the comfortable enjoyment of their land by his neighbours. The user of the ditch by the construction of the culvert was not, indeed, a user of their land by the respondents at all. It was the act of a trespasser. But the respondents continued thereafter to use the ditch for the purpose of draining their adjoining fields without taking steps to ensure that the water did not accumulate therein and as a consequence flood the appellant's premises. Such steps were well within their power. All that it was necessary to do was to provide a grid that would prevent the rubbish that fell into the ditch from passing into the culvert. In these circumstances it seems to me that they committed a nuisance upon their land for which they must be held responsible.

The same result may be arrived at by another line of thought. When the Middlesex County Council constructed the culvert without a proper grid to prevent its getting blocked they created a potential nuisance ; that is to say they did something that in the future might and did in fact seriously damage the appellant as the occupier of No. 1, Victoria Road. The respondents did not themselves create this potential nuisance, and cannot therefore be held liable for its creation. But an occupier of land upon which a nuisance has been created by another person is liable if he "continues" the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question that probably does not admit of a comprehensive answer. But I agree with my noble and learned friend upon the woolsack, whose opinion I have had the privilege of reading, that the occupier "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. Judging them by this criterion the respondents clearly continued the potential nuisance created by the Middlesex County Council. It is, I think, plain that the Court of Appeal in the present case would have held the respondents liable upon this ground if they had not considered themselves precluded from doing so by the decisions in *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors.* (2) Both these cases have been critically examined by my noble and learned friend and I agree with the conclusion he has arrived at with respect to them. The first of them appears to be an authority rather in favour of than adverse to the liability of an occupier of land for continuing a nuisance created by another. The second in so far as it draws a distinction between the continuance of a private nuisance and the continuance of a public nuisance ought not to be followed. With all respect to Bankes L.J. I am unable to agree that there is any such difference. It is well settled that a private individual, who suffers damage from a public nuisance greater than that sustained by the public in general, is entitled to sue in respect of that damage. So far as he is concerned the nuisance is a private nuisance; and his rights and remedies in respect of both kinds of nuisance are to be ascertained on precisely the same footing.

I agree that the appeal should be allowed.

(1) L. R. 4 C. P. 198.

(2) [1924] 1 K. B. 341.

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LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal affirming a judgment of Branson J. and dismissing the plaintiff's appeal with costs.

The plaintiff is the owner and occupier of a house at Mill Hill known as No. 1, Victoria Road. At the upper end of the garden on the north side and in a position most remote from Victoria Road there is a ditch and beyond the ditch a bank with trees upon it. Admittedly the land beyond the ditch and bank belongs to the respondents. To the west of the appellant's land there is another plot on which stands a block of flats called Holcombe Court. Before 1934 the ditch after leaving the north side of the appellant's premises passed along the northern edge of Holcombe Court to a roadway called Lawrence Street, which runs north and south on the west of that building. In 1934 the owner of Holcombe Court made an agreement with the Middlesex County Council by which the latter agreed to place a pipe 15 inches in diameter on the north side of Holcombe Court in substitution for the ditch. When this work was carried out the ditch was filled in and a garage built on top of the pipe. At the western end the pipe was connected with a manhole and sewer in Lawrence Street. At the eastern end the pipe was carried to a point about 2 feet east of a fence dividing the plaintiff's land from Holcombe Court. Originally the outfall of the ditch into the culvert in Lawrence Street was protected by a grid placed in front of the culvert. When the new and extended pipe was inserted this grid appears to have been taken from its original position and instead of being placed at a little distance from the mouth of the new pipe it was for some unexplained reason placed on top of that pipe.

The plaintiff entered into occupation of No. 1, Victoria Road in February, 1937. On April 20 of that year after a very heavy rainfall the mouth of the pipe became blocked with refuse; the water was unable to escape and the plaintiff's land was flooded. The plaintiff issued a writ on November 3, 1937, against the respondents claiming damages for negligence and nuisance. In the argument before Your Lordships' House the claim for nuisance alone was proceeded with.

The allegations upon which the action was founded were that the ditch was the property of the respondents, that the mouth of the pipe should have been protected by a grid; unprotected it was said to be a potential nuisance which became an actual nuisance when the flood occurred. Various other particulars of nuisance were relied upon in the pleadings, but as the case was presented to this House, they become immaterial.

The respondents denied that the ditch was their property and alleged that, even if it were, the pipe had been inserted in it without their knowledge or authority and that the owner of Holcombe Court and the Middlesex County Council were trespassers upon their land. In their contention where a nuisance has been created in such circumstances by trespassers the owner of the land is not responsible. For this contention they relied upon the cases of *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and *Job Edwards, Ld.* v. *Birmingham Navigations Proprietors.* (2) Those cases were accepted as decisive by the Court of Appeal and said to establish the principle that where a private nuisance has been created on a man's land by a trespasser he is not liable either for its creation or for the mere failure or even refusal on his part to remove it, a view which had already been expressed in terms by Bankes L.J. in *Job Edwards, Ld.*, case. (3)

So far as the question of ownership is concerned, in common with all your Lordships and with all the members of the tribunals who have adjudicated on the case, I entertain no doubt that the ditch was the property of the respondents. It was proved that at any rate with regard to that portion of the brook which lay at the back of Holcombe Court and the plaintiff's premises and at the back of the houses in Victoria Road lying immediately to the eastward of those premises, the ditch has on its north side a bank which forms part of or is at least contiguous with the respondents' property.

The presumption from these circumstances is that the ditch bank and hedge belong to the owners whose property lies on the far side of the bank. In the present case, however, it was also proved that those members of St. Joseph's Society who were entrusted with the management of its farm and fields were accustomed to clean out the ditch twice a year. Moreover, it appears that the fences of all the houses lying to the south of that portion of the ditch to which I have referred stopped short at the ditch itself and that though the fence between the appellant's property and Holcombe Court had been continued across the soil placed over the culvert yet the portion so continued appeared to be newer than the portion of the fence which led south from the culvert and may well have been erected at the time the culvert was extended. In default of other evidence these facts would lead to the conclusion that the ditch was the property of the respondents, and, indeed, though their representatives argued to the contrary, I think that the learned judge has so found.

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(1) L. R. 4 C. P. 198.

(2) [1924] 1 K. B. 341.

(3) [1924] 1 K. B. 352.

Admittedly the alleged nuisance was a private nuisance and it was not contended by the appellant that at any rate until the respondents knew or ought to have known of the existence of the unprotected pipe they could be held to be liable for the acts of the trespasser who constructed it. The facts with regard to knowledge appear to have been that one of the brethren in charge of the respondents' fields called Brother Dekker saw the insertion of the culvert, and knew from the time of its erection until the land was flooded that it existed with the grid in its present position. He thought, however, that the consent of the respondents' trustees must have been obtained and took no steps either to inform anyone or to protest against the action of the Middlesex County Council. Whether in these circumstances it could be said that the trustees had consented to the insertion of the pipe need not, I think, be considered. At least with the knowledge possessed by those persons whom they left in charge of the ditch the pipe continued for some three years to carry off the water in place of the ditch. Either the trustees themselves should have inspected the ditch and seen what was done or, as I think the true view is, were affected by the knowledge of the gentleman to whom they entrusted their farm and with it the care of the ditch.

In my view, therefore, the respondents at least acquired knowledge of the existence of the pipe and the position of the grid after it had been erected even if they did not acquire that knowledge at the time of its erection in 1934. Their servants knew, and they certainly ought to have known, immediately after the insertion of the pipe what the position of affairs was.

But, it is said, this knowledge creates no liability in them.

If the Court of Appeal were right in their view of the two cases quoted, and if those two cases were rightly decided, the respondents would escape liability. In considering this question a number of cases were quoted to us, some dealing with public and some with private nuisances.

So far as a public nuisance is concerned it is established that its creation or the failure to take reasonable steps to abate it after notice is an actionable wrong and that the duty to abate it lies upon the occupier though the creation be due to the act of a trespasser. *Attorney-General* v. *Tod-Heatley* (1) and *Barker* v. *Herbert* (2) are authorities for this proposition. In the latter case Vaughan Williams L.J. (3) states that the occupier is not liable unless (1.) he or some person for whom he is responsible created the nuisance or (2.) he has neglected to take steps to abate it for an undue time after he became aware, or if he had used reasonable care ought to have become aware, of its existence.

In that particular case the occupier escaped liability because he had not had reasonable time to become aware of the nuisance. Vaughan Williams L.J. quotes *Saxby's* case (4) with apparent approval and both his and Moulton L.J.'s use of the word "continuance" may leave open the question whether an occupier continues a nuisance created on his land by a trespasser merely by failure to abate it. But in the *Tod-Heatley* case (1) the only complaint against the owner was that he failed by not erecting a fence to take the proper precautions to prevent trespassers from depositing noxious things upon his land. That case is authority at least for the proposition that the occupier must take all reasonable steps to prevent the continuance of a nuisance by third parties, and in the case now under consideration the reasonableness of the steps which it is contended the respondents should have taken cannot seriously be disputed, if they must take any steps at all. All that was required was to take the grid from its useless position above the pipe and put it a few feet in front of it.

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(1) [1897] 1 Ch. 560.
(2) [1911] 2 K. B. 633.
(3) [1911] 2 K. B. 637.
(4) L. R. 4 C. P 198.

But it is said there is a distinction between public and private nuisances. It is difficult to see upon what ground such a distinction can be supported. It is true that a public nuisance is a criminal offence and that, in so far as it affects all the public alike, only the public represented by the Attorney-General can obtain an injunction. But if a private person suffers special injury by the public nuisance he can sue in his private capacity for the special wrong done to him. In such circumstances the private person is just as much injured by it as by a private nuisance; indeed to him it is a private nuisance causing special damage.

Saxby v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) was a peculiar case. The respondents apparently owned the banks of the stream in which the obstruction was placed and were under a duty to repair them but the surrounding land belonged to the appellant and apparently there was some dispute as to the right of the respondents to interfere with the obstruction. Bovill C.J. says (2): "The question is whether "they" (the respondents) "were bound to risk the consequences of a personal conflict by doing that which the plaintiff "(they assenting) might have done himself." In any case the decision has been the subject of considerable criticism. Sir Frederick Pollock treats it as depending upon the fact that the defendant was not an owner in possession, and Salmond on Torts, 5th and 6th ed., treats it as unsatisfactory and queries its correctness: see the remarks in the dissenting judgment of Scrutton L.J. in *Job Edwards, Ld.*, case (3). The last-mentioned case is not in my view an authority for the proposition laid down by the Court of Appeal in the judgments now under

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(1) L. R. 4 C. P. 198.
(2) Ibid. 203.
(3) [1924] 1 K. B. 341.

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consideration. It is true that that proposition has the support of Bankes L.J., but Scrutton L.J. dissented and the principles relied upon by Astbury J. (on whom the result depended) are a little difficult to follow. If he is to be taken to regard the statement which he quotes from Clerk and Lindsell on Torts, 7th ed., 1921, p. 419: "Mere omission by the occupier of "premises to abate a nuisance created thereon without his "authority and against his will does not amount to a continu-"ance of it by him so as to render him responsible for it." as universally applicable, I do not agree with him, nor with the decision in *Saxby's* case (1) if it be held to go that length.

It is clear that an occupier may be liable though he (1.) is wholly blameless, (2.) is not only ignorant of the existence of the nuisance but also without means of detecting it, and (3.) entered into occupation after the nuisance had come into existence: see *Broder* v. *Saillard.* (2)

Such a liability is, I think, inconsistent with the contention that the occupier is not liable for the acts of a trespasser of which he has knowledge, though possibly it might be contended that he is responsible for the acts of his predecessor in title but not for those of a trespasser. However this may be, the true view is, I think, that the occupier of land is liable for a nuisance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew or ought to have known of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance.

Finally, however, it is said that the respondents knew, it is true, of the absence of a grid in front of the pipe, but did not know and had no reason for suspecting that any trouble would ensue. Therefore it was contended that they had no knowledge of the nuisance and indeed that no nuisance existed, only the potentiality of a nuisance, i.e., the possibility that the pipe might become blocked and cause a flood on the appellant's land. In a sense this is true, the nuisance is not the existence of the pipe unprotected by a grid but the flooding of the

(1) L. R. 4 C. P. 198.

(2) 2 Ch. D. 692.

appellant's garden—flooding which might be repeated at any time of severe rain.

The respondents, however, ought, I think, as reasonable persons to have recognized the probability, or at least the possibility of a flood occurring. Even if it were conceded that the appellant might in the light of such cases as *Lemmon* v. *Webb* (1) have entered the respondents' lands after notice and placed the grid in its proper place, he was not obliged to do so. As was pointed out in *Lagan Navigation Co.* v. *Lambeg Bleaching, &c., Co., Ld.* (2), the abatement of a nuisance by a private individual is a remedy which the law does not favour. Moreover, in the present case the evidence shows that the appellant had no knowledge of or reason to suspect the existence of any trouble owing to the pipe. But the respondents had, as I have indicated, or ought to have had knowledge of the danger, and could have prevented the danger if they had acted reasonably. For this I think they were liable—not because they were negligent, though it may be that they were, but for nuisance because with knowledge that a state of things existed which might at any time give rise to a nuisance they took no steps to remedy that state of affairs.

The appellant is in my opinion entitled to succeed.

Appeal allowed.

Solicitors for appellant: *Maltz, Mitchell & Co.*
Solicitors for respondents: *Witham & Co.*

(1) [1895] A. C. 1.

(2) [1927] A. C. 226, 244.

[HOUSE OF LORDS.]

LEWIS . . . . APPELLANT ;

AND

DENYE . . . . RESPONDENT.

H. L. (E.)*

1940

May 22, 23, 27, 28; June 27.

Master and servant—Accident to servant—Dangerous machinery insufficiently fenced—Action for breach of statutory duty—Contributory negligence—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 79—*Woodworking Machinery Regulations*, 1922 (*St. R. & O.*, 1922, *No.* 1196).

The Factory and Workshop Act, 1901, provided in s. 10, sub-s. 1 (*c*), that "all dangerous parts of the machinery . . . . must . . . . be securely fenced . . . ."

Sect. 79 gave the Secretary of State power to make regulations for the safety of persons employed in dangerous trades.

The Woodworking Machinery Regulations, 1922, made in pursuance of s. 79, imposed upon the occupier of a woodworking factory an obligation (reg. 10) to see that every circular saw should be fenced, and that the top of the saw should be covered by a strong and easily adjustable guard, and (reg. 11) to provide a suitable "push stick" for use at the bench of every circular saw, which is fed by hand, to enable the work to be carried on without unnecessary risk.

The Woodworking Machinery Regulations also imposed a duty (reg. 23) upon persons employed in a woodworking factory to use the "push stick" provided in compliance with the regulations.

The plaintiff, a boy sixteen and a half years of age, who was in the employment of the defendant, met with an accident while working at a circular saw at which he had been working for about seventeen months. The saw was of the most modern type, and was fitted with a guard. The plaintiff, whose work was cutting pieces of wood by the saw, was supplied with a "push stick" for the purpose of pushing through the wood. While cutting the wood the fingers of his left hand were caught in the saw, causing the injury complained of. In an action against the defendant for breach of statutory duty in failing to have the saw securely fenced Tucker J. held that though the defendant had committed a breach of his statutory duty in failing to have the saw securely fenced, the accident happened owing to the failure of the plaintiff to use the "push stick" and therefore he was not entitled to recover. Tucker J.'s decision was upheld by the Court of Appeal. On appeal to this House :—

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* *Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD ROMER, and LORD PORTER.

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Held (Lord Atkin with some hesitation) that it was not the breach of duty by the employer, but it was the appellant's own negligence in failing to use the "push stick" that was the real and effective cause of the accident.

Opinion reserved as to the correctness of the view expressed by Salter J. in *Davies* v. *Thomas Owen & Co., Ld.* [1919] 2 K. B. 39, 41, that "if a machine cannot be securely fenced while remaining "commercially practicable or mechanically useful, the statute, in "effect, prohibits its use."

Decision of Court of Appeal [1939] 1 K. B. 540 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Tucker J.

The plaintiff in the action, who was between sixteen and seventeen years of age, sued the defendant, the occupier of a woodworking factory, in whose employment the plaintiff was, claiming damages for breach of statutory duty, whereby his hand was seriously injured by coming in contact with the teeth of a power-driven circular saw which he was using at the time. The defendant denied any negligence or breach of statutory duty, and pleaded that in any case the plaintiff's injuries were caused, or contributed to, by his own negligence or breach of statutory duty. It was in evidence that the circular saw in question was of the most modern type, and was fitted with a guard, which, however, as the judge found, did not securely fence the saw, and with this saw the plaintiff, at the material time, was cutting pieces of wood. He was supplied with a "push stick" for the purpose of pushing through the wood, but he was not using this when the accident happened, and the fingers of his hand were caught in the saw, causing the injury complained of.

The saw was admittedly "dangerous machinery" within the meaning of s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, and by the terms of that section it should have been securely fenced. The Woodworking Machinery Regulations, 1922, contain detailed provisions as to the fencing of circular saws, requiring (inter alia) that "the guard shall be "kept so adjusted that the said flange shall extend below the "roots of the teeth of the saw," and one of the other regulations requires that "a suitable push stick shall be kept available for

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(1) [1939] 1 K. B. 540.

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"use at the bench of every circular saw which is fed by hand "to enable the work to be carried on without unnecessary risk."

Tucker J., who tried the action, held that though the defendant had committed a breach of his statutory duty by not having the saw securely fenced, the plaintiff could not recover by reason of his own contributory negligence in not using the "push stick." The Court of Appeal having affirmed the decision of Tucker J., the plaintiff appealed to this House.

E. G. Hemmerde K.C., *Miss E. A. MacDonald*, and *A. D. Pappworth* for the appellant. There is no evidence of contributory negligence in the sense in which that was dealt with in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1) In that case, as Lord Wright pointed out (2), "the policy of the "statutory protection would be nullified if a workman were "held debarred from recovering because he was guilty of some "carelessness or inattention to his own safety, which, though "trivial in itself threw him into the danger consequent on the "breach by his employer of the statutory duty. It is the "breach of statute, not the act of inadvertence or carelessness, "which is then the dominant or effective cause of the injury." This language is exactly applicable to the present appeal. The very fact of the accident happening shows insufficient fencing. With regard to the "push stick," the only obligation imposed is that it shall be used, but nothing is said in the rules as to the manner in which it is to be used. Moreover, as Greer L.J. said in *Murray* v. *Schwachman* (3), the respondent should not be permitted to take advantage of his own wrong in not having the saw securely fenced.

Hartley Shawcross K.C. and *Glynn Blackledge* for the respondent. The regulations as to fencing do not go so far as to prescribe that the machinery must be fenced against all possible danger. If that were so the circular saw would be wholly unusable. The machine in question had all the safety devices which it was possible to have and that is sufficient: see *Coltness Iron Co.* v. *Sharp.* (4) In *Davies* v. *Thomas Owen*

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(1) Ante, p. 152.
(2) Ibid. 179.
(3) [1938] 1 K. B. 130.
(4) [1938] A. C. 90.

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and Co., Ld. (1), Salter J. expressed the view that "if a machine "cannot be securely fenced while remaining commercially "practicable or mechanically useful the statute in effect "prohibits its use," and the same was said by Lawrence J. in *Fowler* v. *Yorkshire Electric Power Co.* (2), but it is submitted that this is not correct in law. In *Hindle* v. *Birtwistle* (3), Wills J. said that "in considering whether machinery is "dangerous, the contingency of carelessness on the part of the "workman in charge of it, and the frequency with which that "contingency is likely to arise, are matters that must be taken "into consideration." Here the accident would not have occurred were it not that the appellant did not use, as he should have done, the "push stick." His failure to use it was the dominant cause of the accident.

E. G. Hemmerde K.C. What was done by the appellant was not such contributory negligence as to disable him from recovering. Moreover, the Factory Acts give no power to depart from the statutory duty imposed, namely, the secure fencing of dangerous machinery.

The House took time for consideration.

1940. June 27. VISCOUNT SIMON L.C. My Lords, this is an appeal from an order of the Court of Appeal in England, dated January 27, 1939, affirming a judgment in favour of the respondent given by Tucker J. at Liverpool Assizes on April 14, 1938. The action was brought by the appellant, Leonard Lewis (an infant suing by his father and next friend, George Lewis) against the respondent, Denye, an occupier of a woodworking factory situated at Birkenhead, for damages for breach of statutory duty whereby the appellant's left hand was seriously injured through coming into contact with the teeth of a power-driven circular saw which he was using at the time. The claim was alternatively put as a claim for damages for negligence arising from failure to fence the saw adequately, but this House has decided in *Lochgelly Iron and Coal Co., Ld.*

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(1) [1919] 2 K. B. 39.
(2) (1939) 55 Times L. R. 375.
(3) [1897] 1 Q. B. 192, 195.

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v. *M'Mullan* (1), that a breach of statutory duty imposed as a protection to workmen against injury is, for the purposes of an action for damages, equivalent to negligence, so this alternative way of stating the claim need not be separately considered. The respondent denied any negligence or breach of statutory duty, and pleaded that in any case the appellant's injuries were caused, or, in the alternative, were contributed to, by the appellant's own negligence or breach of statutory duty.

The appellant at the time of the accident in June, 1937, was between sixteen and seventeen years of age. He had been working at the respondent's factory at various wood-cutting machines for about eighteen months, and he had often used the particular machine which injured him. It was a vertical saw set in a bench table, so that only about a quarter of the disc of the saw projected above the level of the bench. The appellant was occupied in reducing to two inches the width of a large number of pieces of wood, which were about two feet long and which varied from two to three inches in depth. There are indications in the evidence that the width of the pieces before they were sawn was about four to five inches. The method of working was for the appellant to stand facing the front of the revolving saw and to push each length of wood in turn, by means of a "push stick" applied at the end of the length, along the bench table until it was engaged by the saw's descending teeth and then until it was sawn through from end to end, so as to produce a piece of the prescribed width on the right, and an "off cut" on the left, of the saw. The workman secured the prescribed dimension of two inches of width by pressing the wood, as it approached the saw, with his left hand against a perpendicular slab called a "guide fence," which was adjusted in a plane parallel to the plane of the saw and at a distance of two inches to the right of it as the workman was standing. It was, therefore, a necessary part of the operation that the workman should use his left hand to keep the piece of wood pressed against the "guide fence," at any rate until the teeth of the saw had bitten into the wood. At the far side of the saw, and in a direct line with it, there was fixed

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(1) [1934] A. C. 1.

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a wedge-shaped "riving knife," with its front edge close to the ascending teeth of the saw, which served the purpose of splitting or separating the two severed pieces of wood more completely as they left the saw.

A great deal of confusion arose at the trial because the appellant's case was until a late stage presented as that of an injury caused to the thumb and fingers of his left hand, owing to their being caught in the teeth of the saw at the "riving knife" end. The trial judge, who described the appellant's manner of giving evidence as most unconvincing, came to the conclusion that the accident happened at the point of entrance, i.e., at the place where the wood is fed into the saw and not at the further side where the severed wood leaves the saw and encounters the "riving knife." The Court of Appeal took the same view and there can be no doubt that Tucker J.'s finding on this point is correct. The saw was whizzing round at a great pace, the appellant was performing a repetitive operation which occupied only a few seconds and which he had carried through again and again, the accident was sudden, unexpected and very painful, and it is not perhaps surprising that this youth did not reconstruct the incident correctly.

The revolving saw was admittedly "dangerous machinery" within the meaning of s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, and therefore, by the terms of that section, required to be "securely fenced." If it was not, the factory, by sub-s. 2 of that section would be "deemed not to be "kept in conformity with this Act," and the occupier would be liable to legal proceedings under s. 135. Moreover, under s. 79 of the Act, which is one of the bundle of sections dealing with Regulations for Dangerous Trades, the Home Secretary has certified that woodworking machinery is dangerous and has exercised his power to "make such regulations as appeared "to him to be reasonably practicable and to meet the necessity "of the case." The Woodworking Machinery Regulations, 1922, contain, in reg. 10, detailed requirements for the fencing of a circular saw by means of an adjustable guard, with a flange at the side of the saw farthest from the fence. The regulation goes on: "The guard shall be kept so adjusted that "the said flange shall extend below the roots of the teeth of "the saw. The guard shall extend from the top of the riving "knife to a point as low as practicable at the cutting edge of "the saw." In the case of a circular saw which is fed by hand (and this was the species of saw in the present case), reg. 11 provides: " A suitable push-stick shall be kept available for "use at the bench of every circular saw which is fed by hand to "enable the work to be carried on without unnecessary risk."

Other regulations upon which the appellant relied provided for the training and instruction of any workman to be employed at a woodworking machine, and for the arrangement of the riving knife in relation to the teeth of the saw. Neither Tucker J. nor the members of the Court of Appeal, regarded these matters as material to the issue and I need not further refer to them.

The Woodworking Machinery Regulations, 1922, also contained, under the Part headed "Duties of Persons Employed," a regulation, numbered 23, requiring every person employed on a woodworking machine to " (1.) use and maintain in proper "adjustment the guards provided in accordance with these "regulations; (2.) use the . . . . push-sticks . . . . provided "in compliance with reg. 11 . . . . except when, owing to the "nature of the work being done, the use of the guards or "appliances is rendered impracticable." The exception has no application to the present case.

The primary purpose of the push-stick, as its name implies, is to push the piece of wood which is about to be cut into and through the teeth of the saw. A push-stick is required for a circular saw which is "fed by hand" because otherwise the hand of the workman, with the workman's weight behind it, would have to advance right up to the teeth of the saw before the wood was completely cut. But, as I have already pointed out, the workman's left hand is needed to keep the piece of wood, as it approaches the teeth of the saw, hard up against the guide fence. Once the saw has got through the wood, the "off-cut" on the left of the saw has to be moved away in order not to encumber the bench table for the succeeding operation. The appellant in his evidence at the trial admitted that the push-stick, which is throughout held in the right hand, should also be used for knocking the "off cut" away as it is severed from the main piece by the saw, and he asserted that this is what he did. His case was that after doing this, he picked up the "off cut," which was then lying loose on the bench table, and, in grasping it, got his left hand caught at the riving knife end of the apparatus because, as he alleged, the fencing was not adequate or was not properly adjusted. The learned judge, after a full consideration of all the evidence, rejected this version and declared himself convinced that "though he may have been "using the push stick to push through the sized timber pieces, "he used his left hand near the point of entrance to detach "the 'off cut,' a proceeding which, though highly dangerous, is "none the less easy to perform if carefully done. . . . . The "accident happened at the point of entrance, through failure "to use the push-stick and not as described by the infant "plaintiff."

I have read the transcript of the evidence more than once. There was ample material upon which the learned judge could base his decision as to the facts, and I agree with his conclusion. This conclusion was accepted by the Court of Appeal, and, though this House is at liberty to re-examine the facts, I apprehend that on such a matter as this, where so much depends on testimony as to technical details which cannot be adequately reviewed in the absence of witnesses, your Lordships would be slow to disturb such a finding unless it was unsupported by evidence, more particularly in a case such as this where witnesses demonstrated by the use a of model how they said or inferred that the accident had happened, and when the record of their evidence furnished to this House makes the real effect of some of the demonstration impossible to follow. I venture to add that those engaged at a trial in extracting the testimony of witnesses with the help of a model would do well to remember that the demonstratives "this" or "that" or "here" or "there," while illuminating the understanding when the eye can follow a moving finger or a wave of the hand, may convey no information whatever when the gaze of an appellate tribunal is necessarily restricted to the still-life of a shorthand note.

On the issue whether the appellant established against the respondent any breach of statutory duty, the trial judge reached the conclusion that the respondent had carried out all the requirements of the regulations incumbent upon him, so far as these were relevant to the accident. But Tucker J. went on to hold that, nevertheless, s. 10 was not complied with, inasmuch as, by reason of the exposed teeth of the saw at the point of entrance, the machine could not be said to have been "securely fenced."

My Lords, in the view which I take of this case, it is not necessary to pronounce upon the correctness of either of these conclusions, for I have reached the view that it was not any breach of duty by the respondent, but it was the appellant's own negligent proceeding, described by the trial judge as "highly dangerous," which was the "real and effective cause "of the accident." This is the unanimous view of the Court of Appeal. Tucker J. put the matter somewhat differently (though he reached the same result), for he based the conclusion that the appellant could not succeed upon his breach of the statutory duty laid upon him by the Woodworking Machinery Regulations to observe reg. 23. I am not satisfied that a breach of Regulations for Dangerous Trades imposing duties on the workman in all cases automatically furnishes a defence to the employer whom he sues for damages for breach of statutory duties imposed on the employer. The workman's breach may, however, be such as to provide evidence of his negligence. And here, apart altogether from reg. 23, negligence of the appellant which caused the accident was in my opinion made out.

Such negligence would not, indeed, be conclusive of the case if the obligation to keep dangerous machinery "securely fenced," which is imposed upon the occupier by s. 10, permits the injured workman to hold his employer liable even though his injury is caused, or contributed to, by his own negligence. This question, however, was recently considered in your Lordships' House in reference to a similarly phrased section of the Coal Mines Act, 1911, in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1) The decision of this House in *Caswell's* case (1) was pronounced after the judgments of the Court of

(1) Ante, p. 152.

Appeal in the present case and confirms the view, which was really assumed in the judgments in the present case in the Courts below, namely, that negligence in the workman causing or contributing to the accident is a defence in an action alleging that the occupier did not fence securely. If the decision of the High Court of Australia in *Bourke* v. *Butterfield and Lewis, Ld.* (1) is to be regarded as going so far as to lay down that, in an action for damages for breach of the statutory duty to furnish protection against dangerous machinery, no amount of negligence on the part of the plaintiff workman can ever provide a defence, this House in *Caswell's* case (2) indicated that it could not accept so absolute and far-reaching a rule when construing s. 55 of the Coal Mines Act, 1911. I quote the following passage on the point from the speech of my noble and learned friend, Lord Atkin (3): "The argument is that safety obligations are "placed upon employers for the purpose of protecting not only "workmen who are careful but also those who are careless, "and that the object of the Legislature is defeated if the right to "sue for injuries caused by the breach of the safety regulations "is denied to the careless workman for whose benefit, amongst "others, the legislation was specially enacted. I venture to "think that this attractive theory does not give sufficient "weight to the true cause of action in such cases. The statute "does not in terms create a statutory cause of action. It does "not, for instance, make the employer an insurer. The person "who is injured, as in all cases where damage is the gist of the "action, must show not only a breach of duty but that his "hurt was due to the breach. If his damage is due entirely "to his own wilful act, no cause of action arises; as, for "instance, if out of bravado he puts his hand into moving "machinery or attempts to leap over an unguarded cavity. The "injury has not been caused by the defendants' omission but "by the plaintiff's own act. But the injury may be the result "of two causes operating at the same time, a breach of duty "by the defendant and the omission on the part of the plaintiff "to use the ordinary care for the protection of himself or

(1) (1926) 38 C. L. R. 354.
(2) Ante, p. 152.
(3) Ante, pp. 164, 165.

"his property that is used by the ordinary reasonable man in "those circumstances. In that case the plaintiff cannot recover "because the injury is partly caused by what is imputed to "him as his own default. On the other hand if the plaintiff "were negligent but his negligence was not a cause operating "to produce the damage there would be no defence."

Lord Atkin, and also Lord Wright, in that case expressed approval of the statement of the law made by Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ld.* (1), which ends with the passage: "I think, of course, that in considering "whether an ordinary prudent workman would have taken "more care than the injured man, the tribunal of fact has to "take into account all the circumstances of work in a factory "and that it is not for every risky thing which a workman in "a factory may do in his familiarity with the machinery that "a plaintiff ought to be held guilty of contributory negligence."

I entirely accept these conclusions as applying to the construction of s. 10 of the Factory and Workshop Act, 1901. Under that Act, as under s. 55 of the Coal Mines Act, I agree that too high a standard of care must not be demanded from a workman. The action of the appellant, however, in using his left hand near the point where the almost severed wood reached the teeth of the saw, to detach the "off cut," has been found by the learned judge to be a "highly dangerous proceeding." I agree with this finding. In all the circumstances it was not such an act as his familiarity with the machine might justify or condone. An act of this quality was at least a substantial cause of the appellant's injury and therefore contributed to it so as to exonerate the respondent from liability.

This disposes of the appeal, but I must add one observation on the construction of s. 10 in order to make clear what is, and what is not, being decided in the present judgment. Does s. 10 impose an obligation to provide such a degree of secure fencing for a dangerous machine as makes the machine no longer dangerous at all to a reasonably careful workman, even though this result could only be attained at the expense of making the use of the machine impracticable, and hence in effect prohibiting its use altogether? Or is a dangerous machine to be regarded as "securely fenced" under s. 10 if the fencing protects the workman from danger so far as that can practicably be done, consistently with the machine being used? If the first of these two views were correct, this might amount to a prohibition of the use of circular saws altogether (even saws of the most modern type, such as this one, fitted with the best known safety devices), and I should be extremely unwilling to make the present case the occasion for a final pronouncement on this issue, which is so important to British industry alike in peace and in war, unless this were necessary for our decision. It is not so necessary and I desire to reserve my opinion as to the correctness of the view expressed by Salter J. in *Davies* v. *Thomas Owen & Co.* (1), which would interpret the section as meaning that "if a machine cannot be securely fenced while "remaining commercially practicable or mechanically useful, "the statute in effect prohibits its use."

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(1) [1934] 2 K. B. 132, 140.

For the purpose of determining the present appeal, it is unnecessary to decide whether the respondent had fully discharged his obligation to fence or whether he had not. The conclusion that the appellant's own negligence caused or contributed to his injury is sufficient to exonerate the respondent in this action.

I move that the appeal be dismissed.

The appellant should have four weeks from to-day in which to apply, if he so desires, to the county court for compensation to be assessed under the Workmen's Compensation Act, 1925.

LORD ATKIN. My Lords, I doubt whether, unassisted, I should have been able to come to the conclusion that this boy had been guilty of such contributory negligence as came within the qualifications placed upon the workman's duty of care in such circumstances by the decision of this House in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2), and I should have attached importance to the fact that that case was decided after the judgments were given in the Court of Appeal in the present case. But all your Lordships and all the judges in the

(1) [1919] 2 K. B. 39, 41.

(2) Ante, p. 152.

Courts below are of opinion that the plaintiff was guilty of contributory negligence, and I suppose I must be wrong; at any rate, I do not dissent.

I only wish to add that in reserving, as the Lord Chancellor does, any decision upon the construction of s. 10 of the Factory and Workshop Act, 1901, I do not thereby wish to express any doubt as to the correctness of the case to which he refers and the numerous cases following it.

Lord Thankerton. My Lords, I have had the opportunity and privilege of considering the opinion just delivered by my noble and learned friend on the woolsack, and I desire to express my entire concurrence in it.

Lord Romer. My Lords, I, too, have had the privilege of reading and considering the opinion which has just been delivered by my noble and learned friend on the woolsack. That opinion completely expresses my own views upon this matter, and I agree with the motion which he has proposed.

Lord Porter. My Lords, I also concur.

Appeal dismissed.

Solicitors for appellant: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

Solicitor for respondent: *W. Stanley Eastburn.*

[HOUSE OF LORDS.]

H. L. (E.)*
1940
April 4, 8;
May 30.

CANADIAN TRANSPORT COMPANY, LIMITED . . . . APPELLANTS;

COURT LINE, LIMITED . . . . . RESPONDENTS.

Shipping—Charterparty—Cargo to be loaded, stowed and trimmed at charterers' expense "under the supervision of the captain"—Charterers' obligation.

By the terms of a charterparty the charterers were to "load, "stow and trim the cargo at their expense under the supervision "of the captain":—

Held, that the reservation of the captain's right to supervise the stowage had not the effect of relieving the charterers of their primary duty to stow safely. To the extent, however, that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

By a charterparty dated January 28, 1937, Court Line, Ld., agreed to let and the Canadian Transport Company, Ld., agreed to hire the steamship *Ovington Court* under a charterparty which provided (inter alia) that "the captain (although "appointed by the owners) shall be under the orders and "direction of the charterers as regards employment or agency; "and charterers are to load, stow and trim the cargo at their "expense, under the supervision of the captain, who is to "sign bills of lading for cargo as presented, in conformity with "mates' or tally clerks' receipts. Owners to give time "charterers the benefit of their protection and indemnity "club insurances so far as club rules allow, and in case of "shortage or damage to cargo, charterers to bear the franchise "according to the club rules, which owners would have "otherwise borne."

During the currency of the charterparty, Court Line, Ld., became liable to pay the sum of 101*l.* 3*s.* 4*d.* to receivers of cargo under certain bills of lading covering wheat in bulk in respect of failure to deliver the wheat in the same condition as when shipped, the damage being due to improper stowage. The sum of 101*l.* 3*s.* 4*d.* was paid in full by the West of England Shipowners' Protection and Indemnity Association, Ld., to the receivers, the claimants remaining liable to refund 10*l.* in respect thereof to the Association. The Court Line claimed 101*l.* 3*s.* 4*d.*, or alternatively 10*l.* Subject to the opinion of the Court, the arbitrator awarded that the Court Line should recover 10*l.* from the Canadian Transport Company. Lewis J. having affirmed this award, the shipowners appealed, and the Court of Appeal (Scott and Clauson L.JJ., Goddard L.J. dissenting) awarded the shipowners the full amount of the damages, 101*l.* 3*s.* 4*d.*

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

Court Line, Ld., appealed to this House.

Sir Robert Aske K.C. and *Cyril Miller* for the appellants. By the terms of the charterparty the appellants have limited their obligations as to loading, namely, by providing that it is to be under the supervision of the captain. The effect of that provision is that the appellants are not liable unless it can be established, which it was not, that the appellants failed properly to load under that supervision. The language used required the captain to supervise the loading, and that included deciding where the cargo was to be stowed.

G. St. Clair Pilcher K.C. and *G. N. W. Boyes* (for *H. L. Holman*, absent on war service) for the respondents. We adopt the view expressed by Lewis J. and Goddard L.J. that the shippers are entitled to be indemnified by the charterers.

The House took time for consideration.

1940. May 30. VISCOUNT MAUGHAM. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Atkin on this appeal. As regards the first point, that since the duty of the charterers to stow was expressed to be " under the supervision of the captain " the responsibility for stowage was thrown upon the shipowners, I have had no doubt, nor I believe have any of your Lordships. The contention is clearly an ill-founded one for the reasons given by my noble and learned friend.

As regards the second point which arises on the true construction of that part of clause 8 of the charterparty which provides that the owners are to give to the charterers the benefit of their protection and indemnity club insurances "as far as club rules allow," taken in conjunction with the club rules, I must confess that I have felt considerable doubt. The club rules, particularly rule 2 and rule 17, seem to me to present almost insoluble problems of interpretation, and a judicial mind must recoil from applying to the construction of written documents the principle of mere conjecture. On the whole I think the solution adopted by my noble friend is the best solution which the case admits of, and I concur with what he has said on the point.

I therefore agree with the order of the Court of Appeal and am of opinion that this appeal should be dismissed.

LORD ATKIN. My Lords, This appeal arises on a special case stated by the sole arbitrator on a claim by the respondents the owners of the steamship *Ovington Court* against the appellants, the charterers of the ship on time charter for damages for improper stowage. The charterparty is dated January 28, 1937, and though it is in time charter form it is for the hire of the ship for a voyage from Rotterdam to the North Pacific and return to the United Kingdom or continent. The ship apparently proceeded to Vancouver and there loaded a cargo in respect of which the present claim arises. The special case is particularly niggardly of facts. It does not state from what port the ship sailed or at what port she arrived; it does not state the nature of the cargo, except that some was wheat in bulk, or how the damage arose. It does not annex the bills of lading upon which the owners' original liability arose. None of these particulars is in fact essential for determination of the case; but it is unusual to have to decide a commercial case such as this without being able to satisfy ones ingrained curiosity about them; and the learned arbitrator may be congratulated upon having achieved a degree of abstraction which is certainly rare and perhaps admirable.

By clause 8 of the charterparty ". . . . the charterers are "to load stow and trim the cargo at their expense under the "supervision of the captain who is to sign bills of lading for "cargo, as presented in conformity with mates' or tally clerks' "receipts." By clause 24 the charter was expressly made subject to the terms of the Carriage of Goods by Sea Act of the United States, April 1, 1936, and the Canadian Water Carriage of Goods Act, 1936. On arrival at the port of discharge, wherever it was, a claim was made by holders of bills of lading of wheat in bulk against the shipowners for damage to the goods. The damage was due to improper stowage. The case finds that the owners were liable to pay to the receivers under the bills of lading 101*l.* 3*s.* 4*d.* We are not told why, but if, as we were informed, the ship loaded at Vancouver, presumably the liability arose under Article III. 2 of the Rules under the Canadian Water Carriage of Goods Act which correspond to those in the English Carriage of Goods by Sea Act, 1924. The shipowners claimed to recover this sum which had been paid to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under the provisions of clause 8. The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, etc., "under the supervision of "the captain." This, it was said, threw the actual responsibility for stowage on the captain; or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired. My Lords, it appears to me plain that there is no foundation at all for this defence; and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract. This view of the clause is supported by the decision of Lord Fairfield, Greer J., as he then was, in *Brys and Gylsen, Ld.* v. *J. and J. Drysdale & Co.* (1) It is true that the judge does not refer to the words "under the supervision of the master" which were in the relevant clause; but this seems to me all the more significant. It is obvious that the very experienced judge attached no importance to the words as affecting the liability of the charterers arising from their contract "to provide "and pay a stevedore to do the stowing of the cargo under "the supervision of the master." The charterers were held liable for dead freight due to faulty stowage by the stevedore. This defence fails.

The second defence also arises under clause 8 of the charterparty "owners to give time charterers the benefit of "their Protection and Indemnity Club Insurances as far as "club rules allow, and in case of shortage or damage to cargo "charterers to bear the franchise according to the club rules "which owners would have otherwise borne." The shipowners were members of the West of England Steam Ship Owners' Protection and Indemnity Association, Ld., the rules of which are annexed to the case. Under rule 2 the members are protected and indemnified in respect of losses or claims which they are liable to pay for (i.) claims arising in respect of

(1) (1920) 4 Ll. L. Rep. 24.

the shipment, carriage, discharge or delivery of goods arising through other causes than improper navigation. The Association therefore accepted the liability in respect of the bill of lading owners claim, paid them direct the amount of this claim, and are putting forward the present claim in the name of their member by virtue of their right of subrogation. The charterers in effect say to the shipowners " You have promised "to give me the benefit of your insurance. You have either "received or are entitled to receive the 101*l.* due to the bill "of lading holders from your insurers, or they have paid the "bill of lading holders direct. In any case we don't get the "benefit of your insurance if we have to pay you; and if "indeed we were to pay you you would have to hand over to "us the amount you received from your insurers or were "entitled to receive from them." I myself have had much difficulty in appreciating what the clause really means. It cannot mean that the owners are to hold the charterers covered against the same risks as those against which the Association hold the owners covered. It cannot extend to losses which the owners incur but not the charterers: to losses which the charterers incur but not the owners. But I suppose it may refer to losses which the owners incur by reason of a default by the charterers as in the present case. But in such a case it is obvious that the owners are destroying any right of subrogation which the insurers would have against the charterers. It will be observed that this is not the case of the owners contracting with the charterers that the latter are not to be liable to them in respect of negligence or breach of contract. Insurers have to put up with exception clauses, though their risks are no doubt increased thereby. But this clause leaves original liability untouched. For example, it would have no effect when the owner happened not to be insured in a club, or where the rules of the club did not allow the benefit of the insurance to be given by the member. I suppose, though I do not think it necessary to decide, that a man may contract with another on the terms that if he is injured by that other, then, if he happens to be insured, he will look to his insurers in relief of the wrong-doer. But I am satisfied that such a contract is very unusual, and I should suppose would make it very difficult for the man to renew his insurance; and the last class of insurers to permit such a contract would, I should assume, be any form of mutual insurance society such as a club. The clause is only applicable so far as the club rules allow. There are two rules relied upon by the respondents as indicating that the giving of the benefit suggested by clause 8 of the charter is not allowed by the club. The first is clause 2 (i.), the first words of which, granting the indemnity to the owners, I have read. It continues "the intention being to mutually protect and "indemnify the members against the negligence or default of "their servants or agents. The Association shall be entitled "to take credit for any profit accruing to the members by "reason of any wrongful act of his servants or agents up to "the measure of its loss, or recover for its own account from "third parties any damages that may be provable by reason "of such neglect." This is quite unintelligible on the strict reading of the words: What is meant by such neglect? "Neglect" has not been used before. The only preceding reference to negligence is the negligence of the members' servants or agents which could not cause provable damages against third parties. Endeavouring to give some meaning to the clause I think that the true construction must be damages provable against third parties by reason of their wrongful act or their negligence. If this be so then the rule seems to me to be inconsistent with permission to the members to give the third party the protection of the insurance in defeasance of this right.

The second rule upon which the respondents rely is rule 17. "No assignment or subrogation by a member of his cover "with this Association to charterers or any other person "shall be deemed to bind this Association to any extent "whatsoever." The reference to "subrogation" is obscure, and, so far as I can see, unmeaning. But "assignment" appears to me to cover that which is intended by clause 8 of the charter. There would seem to be no difference between agreeing to "give the benefit of insurance," and "assigning "the cover." I have already discussed the difficulty of giving a real content to the relevant words of clause 8. But if and when they apply it would seem to follow that after loss the charterers would be entitled to claim by way of equitable assignment the sum due by the club to the owners, or received by the owners from the club. In any case clause 8 seems to express an assignment by the owners to the charterers of their cover with the club "give them the benefit of their "insurances": and such assignment does bind the club "to "any extent whatsoever": for if it operates at all, it would appear effectively to deprive the club of its right of subrogation. For these reasons which are substantially those of Scott and Clauson L.JJ. I think that this defence also fails. I agree with the order made by the Court of Appeal and am of opinion that this appeal should be dismissed with costs.

Lord Wright. My Lords, the arbitration out of which this appeal arises was between the respondents, as owners of the *Ovington Court*, and the appellants as charterers under a charterparty dated January 21, 1937, whereby the owners agreed to let, and the charterers agreed to hire, the steamship on a voyage from Rotterdam where she was to be placed at the charterers' disposal to the North Pacific and return to United Kingdom or Continent, via any port or ports at charterers' option, at a rate of hire of 5*s.* per day per ton on her dead weight. The steamship was to be employed in carrying lawful merchandise and in lawful trades between the specified limits. Of the various clauses in the charter clause 8 is the only one which I need particularize. It is as follows: "The captain shall prosecute his voyages with the "utmost despatch and shall render all customary assistance "with the ship's crew and boats. The captain (although "appointed by the owners) shall be under the orders and "direction of the charterers as regards employment or agency; "and charterers are to load stow and trim the cargo at their "expense under the supervision of the captain who is to sign "bills of lading for cargo as presented in conformity with "mates' or tally clerks' receipts. Owners to give time "charterers the benefit of their Protection and Indemnity "Club Insurances," then follow words here printed in italics which were substituted for certain words struck out "*as far* "*as the Club Rules allow* as in case of shortage or damage to "cargo, and charterers to bear the franchise according to the "Club Rules, which owners would have otherwise borne." The issue turns on this clause read in connection with the Rules of the West of England Protection and Indemnity Association, of which the respondents were members.

The award is very bare in stating the facts. No doubt the learned arbitrator stated all the facts placed before him. He stated that under the charterparty the respondents became liable to pay 101*l*. 3*s*. 4*d*. to receivers under bills of lading dated March 18, 1937, covering wheat in bulk for damages for failure to deliver the said goods in the same good order and condition as when shipped. The damage to the goods was due to improper stowage. The sum of 101*l*. 3*s*. 4*d*. was paid in full by the association to the receivers, the respondents remaining liable to refund 10*l*. in respect thereof to the Association. This 10*l*. is the franchise which according to the club rules the owners had to bear in respect of the loss.

The learned arbitrator does not exhibit the bills of lading, but it is obviously assumed that the owners were liable under them to the receivers for improper stowage; indeed that must have been so if they were issued on the North Pacific Coast, and were, as they must have been, subject either to the United States Carriage of Goods by Sea Act, 1936, or the Canadian Water Carriage of Goods Act, 1936. The award stated that no evidence was adduced by either party as to the loading, save that it was admitted that the damage was due to improper stowage. There was no evidence, it added, of the extent, if any, to which there was supervision by the captain, nor was their any evidence of protest or approval by him in respect of the stowage.

The learned arbitrator made his award in the form of a special case for the decision of the Court, whether on the facts found and the true construction of the contract the

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respondents were entitled to recover 101*l.* 3*s.* 4*d.* or 10*l.* or nothing. He awarded, subject to the opinion of the Court, that they should recover 10*l.*, and in the alternative awarded that they should recover 101*l.* 3*s.* 4*d.* or nothing.

His award was upheld by Lewis J., but the Court of Appeal by a majority upheld the alternative award of 101*l.* 3*s.* 4*d.*

There are two quite separate questions. The first is whether the appellants as charterers are liable to indemnify the respondents in respect of their liability under the bills of lading for improper stowage. Both Courts below have answered that question in favour of the respondents. The other question is whether that obligation is under clause 8 of the charterparty and the Club Rules reduced to 10*l.* as the learned arbitrator, Lewis J. and Goddard L.J., dissenting in the Court of Appeal, thought, or whether, as the majority of the Court of Appeal thought, it was not reduced or affected at all. I agree with that latter opinion.

It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but in order to avoid damage to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charterparty to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect. But under clause 8 of this charterparty the charterers are to load, stow and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage, except as qualified by the words " under the supervision of "the captain," which I shall discuss later. The charterers are granted by the shipowners the right of performing a duty which properly attaches to the shipowners. Presumably this is for the convenience of the charterers. If the latter do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders. Justice requires that the charterers should indemnify the shipowners against that liability on the same principle that a similar right of indemnity arises when one person does an act and thereby incurs liability at the request of another, who is then held liable to indemnify. That such a liability on the part of the charterers is contemplated is shown by the last words of clause 8 which supposes that the charterers may incur liability for " damage to cargo."

So far I think is clear. What then is the effect of the words "under the supervision of the master" ? These words expressly give the master a right which I think he must in any case have, to supervise the operations of the charterers in loading and stowing. The master is responsible for the seaworthiness of the ship and also for ensuring that the cargo will not be so loaded as to be subject to damage, by absence of dunnage and separation, by being placed near to other goods or to parts of the ship which are liable to cause damage, or in other ways. A striking instance of bad stowage of this character is *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.* (1) But I think this right is expressly stipulated not only for the sake of accuracy, but specifically as a limitation of the charterers' rights to control the stowage. It follows that to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree. The learned arbitrator was evidently of this opinion. He expressly found that there was no evidence of the extent, if any, to which there was supervision by the captain or of protest or approval by him in respect of the stowage. He obviously held, and as I think rightly held, that there was in this case no ground for imposing any limitation on the charterers' liability to the shipowners in respect of the improper stowage.

The matter is one of some importance in mercantile affairs because a clause of this type is not uncommon. The amount involved here is small, but the liability in other cases may be very considerable. A vessel may be totally lost owing to improper stowage or very severe damage done to cargo. But there does not appear to be any express decision on the point, though in *Bys and Gylsen* v. *Drysdale* (1) Greer J. seems to have been of the same opinion as that which I have expressed. The master's power of supervision is obviously not limited to matters affecting seaworthiness.

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(1) [1924] A. C. 522.

The learned arbitrator did not award to the respondents the full amount which they claimed, but only 10*l.*, obviously because he thought that the appellants were entitled under clause 8 to the benefit of the respondents' club insurances, and hence could only claim 10*l.*, the franchise which they had to bear. In my opinion he was not right in that view.

The relevant words of clause 8 of the charter can only mean that the respondents agree to give the appellants the same rights as they have against the club, which is in substance the right subject to the franchise to be paid the amount of the loss. But this would nullify the right which the club has on payment to its member, to make a claim in the name of the member against the appellants as being the persons whose default has caused the loss. It is obvious, and indeed was admitted at the Bar, that it is just this claim which is being brought in the present arbitration. The appellants' contention, if right, would thus defeat the club's right of subrogation. If that were effectively done by the respondents without the consent of the club, the respondents would be liable for, and the club would be entitled to recover, the value of the right of subrogation from the respondents: *West of England Fire Insurance Co.* v. *Isaacs.* (2) It is not very probable as a matter of business that the respondents would enter into such a bargain with the appellants, and it is just as improbable that the club would sanction it. Though such a bargain would affect the right of subrogation, I do not see how it has any other effect. In the facts of this case the respondents have had to pay the bill of lading holders, they have been indemnified by the club, and the club according to the appellants' claim is now to be deprived of its legal right to claim over against the persons who have caused the damage. This position is entirely different from the position when the remedies against the person in default are limited by the provisions or exceptions in the contract under which the liability arises. There is in clause 8 no exceptive limitation on the appellants' liability to the respondents. Whatever may be the effect of the particular words in question of clause 8, it is subsequent to the liability of the shipowner to the bill of lading holders. Clause 8 can only come into operation when the liability has been incurred. It cannot affect the amount of that liability. It is not, either in form or substance, a promise that there shall be no liability on the appellants to indemnify the respondents. If that were the effect the appellants would not need the protection of the respondents' insurance with the club. I am unable to agree with what I understand to have been the reasons of Goddard L.J. in his dissenting judgment.

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(1) (1920) 4 Ll. L. Rep. 24.

(2) [1897] 1 Q. B. 226.

Without express sanction on the part of the club, I think the appellants' claim would be inadmissible. I turn to the club rules to see if " the club rules allow " what the appellants contend for. I find however that the rules which are vouched as material negative the appellants' contention. So far as concerns the club, the claim against them here in question must have been based on the indemnity section of rule 2 which provides that members are " . . . . indemnified as "shipowners in respect of losses or claims arising without "their actual fault or privity which they shall have become "liable to pay and shall have in fact paid." Rule 2 (i.) headed "Indemnity " is as follows : " For other claims arising in "respect of the shipment, carriage, discharge or delivery of "goods or merchandise, arising from other causes than "' improper navigation ' " [which comes under the head of Protection] " the intention being to mutually protect and "indemnify the members against the negligence or default of "their servants or agents. The Association shall be entitled "to take credit for any profit accruing to the member by "reason of any wrongful act of his servants or agents, up to

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"the measure of its loss, or recover for its own account from "third parties any damages that may be provable by reason "of such neglect." But for the obscurity of the words "such "neglect" it would be clear that the club was stipulating as against its member to have the right to recover on its own account, so far as is necessary to recoup itself for its liability to its member, the damages which the member would be entitled to recover from the person in default. In other words, the latter part of the clause confirms expressly to the club a right corresponding in substance to the ordinary right of subrogation. If the words had been not "such neglect" but "neglect of the third parties or their servants or agents" no question could have arisen. It is certainly difficult to construe "such neglect" with literal or technical accuracy. But I think it can be fairly construed as referring back to the earlier words "negligence or default of their servants or "agents." "Such neglect" on that view reiterates the same idea in application to third parties, to whom alone the latter words relate. This gives a reasonable and intelligible meaning to the words, which otherwise are simply unintelligible. On this interpretation, which I think is right, rule 2 (i.) is expressly inconsistent with the appellants' claim. The rule so far from allowing, definitely disallows, what the appellants contend for.

I think then that rule 2 (i.) excludes such a claim as that of the appellants. If, however, the appellants assert that what they are contending for is to be entitled to claim as assignees of the right to be indemnified which the respondents as members have or had against the club, the claim would obviously be most anomalous in many ways, but it is enough here to say that in my opinion rule 17 would conclusively dispose of it. It provides that "No assignment or subrogation by a member "of his cover with this Association to charterers or any other "person shall be deemed to bind this Association to any "extent whatsoever." I shall ignore the word "subrogation" to which I have failed to give any intelligible meaning. I think it is probably no more than an amplification, technically inaccurate, of the word "assignment." In my opinion, the way of construing clause 8 of the charterparty most favourable to the appellants, is that it amounts to an agreement in equity by the respondents to assign to them the benefit of their insurance or cover with the club, and that the claim which has arisen against the club has become in equity assigned to the appellants. If that be the meaning (and there are many obvious considerations which make me feel that it is much too favourable to the appellants) then rule 17 clearly and expressly nullifies any such agreement to assign.

I agree in substance with the reasoning of Scott and Clauson L.JJ. In my judgment the appeal should be dismissed.

LORD ROMER. My Lords, I have had the privilege of reading the opinions which have just been delivered by my noble and learned friends Lord Atkin and Lord Wright. For the reasons which they give, I also agree that this appeal should be dismissed.

LORD PORTER. My Lords. This case comes to your Lordships' House on appeal from a decision of the Court of Appeal given on May 3, 1938. The dispute was originally submitted to arbitration, in which the award was stated in the form of a special case. It is upon that special case that your Lordships have to determine the rights and liabilities of the parties.

The case is very shortly stated and the facts may, I think, be set out in its wording without unduly lengthening my opinion. They are as follows :—

1. By a charterparty dated January 28, 1937, a copy of which is annexed hereto and forms part of this case, the claimants agreed to let and the respondents agreed to hire the steamship *Ovington Court* for a voyage to the North Pacific and return to the United Kingdom or continent.

2. The said charterparty further provides (inter alia) as follows : " 8. The captain (although appointed by the owners) "shall be under the orders and direction of the charterers as "regards employment or agency, and charterers are to load "stow and trim the cargo at their expense under the super-"vision of the captain who is to sign bills of lading for cargo "as presented, in conformity with mates' and tally clerks'

"receipts. Owners to give time charterers the benefit of their "protection and indemnity club insurances as far as club "rules allow, and in case of shortage or damage to cargo "charterers to bear the franchise according to the club rules, "which owners would have otherwise borne."

3. At all material times the claimants were members of the West of England Steam Ship Owners Protection and Indemnity Association, Ld., and the said steamship was entered in Class 1 Protection and Indemnity. A copy of the rules of the said association is annexed hereto and forms part of this case.

4. The said rules provided as to class 1 (inter alia) as follows: " 2. The members are protected and indemnified as "shipowners in respect of losses or claims arising without "their actual fault or privity, which they shall have become "liable to pay, and shall have in fact paid as follows:—

" INDEMNITY.

"(i.) For other claims arising in respect of the shipment, "carriage, discharge, or delivery of goods or merchandise "arising through other causes than 'improper navigation' the "intention being to mutually protect and indemnify the "members against the negligence or default of their servants "or agents. . . . . "Provided that, except in respect of claims "for loss of life and personal injury the member shall bear "the first 10*l*. of any one claim attaching to either the "Protection or Indemnity section of the rules. . . . . 17. No ". . . . assignment or subrogation by a member of his cover "with this Association to charterers or any other person "shall be deemed to bind this Association to any extent "whatsoever."

5. During the currency of the said charterparty the claimants became liable to pay the sum of 101*l*. 3*s*. 4*d*. to receivers under certain bills of lading, dated March 18, 1937, and covering wheat in bulk, as damages for failure to deliver the said goods in the same good order and condition as when shipped. The damage to the said goods was due to improper stowage.

6. The said sum of 101*l*. 3*s*. 4*d*. was paid in full by the said

Association to the said receivers, the claimants remaining liable to refund 10*l.* in respect thereof to the said Association.

. . . .

11. Save that it was admitted that the damage was due to improper stowage, no evidence was adduced by either party as to the loading. There was no evidence of the extent, if any, to which there was supervision by the captain nor was there any evidence of protest or approval by him in respect of the stowage.

In these circumstances the appellants, who were the shipowners, claimed that the respondents, who were the charterers, were liable under the terms of clause 8 of the charterparty to indemnify them in respect of the loss sustained by reason of bad stowage. The respondents maintained that on the true construction of the clause the liability for proper stowage was upon the ship, and not upon the charterers, and that in any event the charterers were entitled to rely upon the latter part of the clause by which the owners were to give them the benefit of their insurances.

The learned arbitrator awarded the claimants 10*l.* only, namely, the amount of franchise which the shipowner had to bear before he received any indemnity from his club. This award was affirmed by the learned judge to whom the award was referred. The Court of Appeal, however, reversed these decisions and found in the terms of one of the alternative awards that the claimants were entitled to recover 101*l.* 3*s.* 4*d.*

Before your Lordships' house the appellants maintained that they were free from any liability to the respondents. In their submission the responsibility for loading, stowing and trimming the cargo was that of the owners through their master and not of the charterers. Alternatively they contended as they had also contended before the learned arbitrator that they were liable only for the 10*l.* awarded by him because, even if the obligation of safe stowage was imposed upon them, they were entitled to the benefit of the indemnity club insurances, and as the shipowners had been recouped by the club for all their loss except the 10*l.* franchise, no further loss was payable by the charterers. The shipowners on the other hand said

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that it was the charterers who were under an obligation to stow safely and that the indemnity which was promised to them was only available so far as the club rules allowed. The club rules, as they alleged, did not so allow, and for this contention they relied not only upon clause 17 quoted in paragraph 4 of the special case, but also upon the rest of the wording of clause 2 (I.) of the club's rules, which after beginning as set out in paragraph 4 of the special case, continues as follows: "The Association shall be entitled to "take credit for any profit accruing to the member by reason "of any wrongful act of his servants or agents, up to the "measure of its loss, or recover for its own account from "third parties any damages that may be payable by reason "of such neglect."

From the facts stated it is apparent that the question to be determined depends solely upon a true interpretation of the charterparty. The grounds upon and the circumstances under which liability for stowage falls either upon the shipowner or charterer as the case may be, have been discussed in a number of cases, four of which involved a consideration of liability as between shipowners and charterers themselves. They are *The Catherine Chalmers* (1); *Sack* v. *Ford* (2); *Harris* v. *Best* (3); and *Brys and Gylsen* v. *Drysdale & Co.* (4)

I do not for myself find much assistance from the decisions in any of these cases. The wording in all except *Brys and Gylsen* v. *Drysdale & Co.* (4) is very different from that used in the present charterparty, and though in the last-mentioned case the wording is similar to that in the present, the learned judge who tried the case accepted the view that the liability was imposed upon the charterers apparently without being asked to give any very close consideration to the matter. Speaking for myself, however, I am in agreement with what I understand to be not only his view in that case but also the view of all the tribunals which in the present case have had to consider the meaning of the charterparty. In my

(1) (1874) 32 L. T. 847.
(2) (1862) 13 C. B. (N. S.) 90.
(3) (1892) 7 Asp. Mar. L. C. 272.
(4) 4 Ll. L. Rep. 24.

opinion by their contract the charterers have undertaken to load, stow and trim the cargo, and that expression necessarily means that they will stow with due care. Prima facie such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases as, e.g., where the stability of the ship is concerned the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers. The primary duty of stowage, however, is imposed upon the charterers and if they desire to escape from this obligation they must, I think, obtain a finding which imposes the liability upon the captain and not upon them.

In the present case there is no such finding and there is no reason for allowing them to evade the obligations which they have undertaken.

It will be seen that in the view I have expressed, my opinion is formed solely upon the terms of the contractual relations existing between the parties by reason of clause 8 of the charterparty. These are, I think, sufficient to impose a liability upon the charterers and it is not necessary to consider the alternative view taken by the Court of Appeal that the charterers by requesting the captain to sign the bills of lading under which the obligation of delivering cargo in good condition was imposed upon the ship, undertook to indemnify the shipowners against liability so incurred.

If I am right in so construing the charterparty the charterers are liable for sums paid by the shipowners in respect of damage to bill of lading holders, except to the extent to which they are protected by the provision that owners are to give charterers the benefit of the protection and indemnity of the club insurances so far as club rules allow.

This phraseology is somewhat obscure and might, I think, bear one of two meanings, (1.) that the owners will assign to the charterers their right of action against the club for losses in respect of which the club have undertaken to indemnify them, or (2.) that the owners being indemnified against such loss by their protection club would forego their right to sue the charterers in respect of losses so recoverable for which the charterers would otherwise be liable.

Whichever view be taken of the true meaning of the clause, I think the club rules forbid the shipowner giving the benefit suggested. In the one case despite the obscurity of the expression " subrogation by a member of his cover with this "Association," the provisions of rule 17 would appear to prevent the assignment suggested. Whatever " subrogation " may mean in this collocation, the rule in my view forbids the assignment, whether before or after loss, of the member's rights against the club. But if the meaning suggested under head (2.) above is preferred then the giving of such benefit is prohibited by the words quoted above from rule 2 (*i.*), " The "Association shall be entitled to . . . . recover for its own "account from third parties any damages which may be "provable by reason of such neglect." The use of the words "such neglect " gives rise to some difficulty. Strictly speaking the only negligence mentioned in the sub-rule is the negligence of the member's servants or agents. Obviously, however, third parties cannot be liable for the neglect of a member's servants or agents, and I think that a reasonable construction may be put upon the words by reading " such neglect " as meaning the neglect of the servants or agent of the third party. If this be the true view, the sub-rule expressly provides for the retention of the club's right to recover against third parties who are liable for bad stowage or for other matters causing loss to the shipowner and forbids the shipowner from excusing the third party from the results of his negligence.

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Whether the one interpretation or the other be put upon the phrase "owners to give time charterers the benefit of the "protection of their club insurances so far as club rules allow," club rules in this case do not allow the granting of the benefit which the owners are suggested to have given.

For these reasons I think the judgment of the Court of Appeal was right and should be affirmed with costs.

Appeal dismissed.

Solicitors for appellants: *Middleton, Lewis & Clarke.*
Solicitors for respondents: *Holman, Fenwick & Willan.*

[HOUSE OF LORDS.]

WEAVER . . . . APPELLANT;

AND

TREDEGAR IRON AND COAL COMPANY, LIMITED . . . . . . RESPONDENTS.

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April 9, 10, 11; May 30.

Workmen's compensation—Miner injured while boarding train—Halt provided by railway company by arrangement with colliery owners—Whether accident arose out of and in the course of the employment—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

The appellant, a miner in the employment of the respondents, worked at a pit which abutted on a branch railway where there was no regular station but where by an arrangement between the respondents and the railway company, the latter, for the convenience of the respondents' employees, provided platforms at which trains called at the time of the colliery change of shifts, and access to the platforms was permitted only to the respondent company's employees. On leaving the colliery one day, the appellant went to the platform in order to travel home by train, but while there, owing to a crush of workmen on the platform, he was accidentally pushed off on to the line and was injured by an approaching train. On a claim for compensation under the Workmen's Compensation Act, 1925 :—

Held (Viscount Maugham dissenting), that as the appellant was making use of the platform which the respondents had arranged to be provided for their workmen coming to and leaving the colliery, and as he was upon premises which the respondents, for the purposes of the employment, had obtained for him a licence to use, and on which he had no right to be except by the conditions of his employment, the accident arose out of and in the course of his employment, and he was therefore entitled to compensation under the Act.

Statement by Lord Macmillan in *Northumbrian Shipping Co., Ld.* v. *McCullum* (1932) 48 Times L. R. 568, 572, that "it has "been recognised time and again that the sphere of a workman's "employment is not necessarily limited to the actual place where "he does his work. If in going to or coming from his work he "has to use an access which is part of his employer's premises, "or which he is only entitled to traverse because he is going to "or coming from his work, he is held to be on his master's "business while he is using that access," applied.

Decision of Court of Appeal reversed.

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* *Present :* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

APPEAL from the Court of Appeal.

The appellant was a miner in the employment of the respondents. The pit in which he was employed was near a road by which the workmen could walk or bicycle to their homes, but it also abutted on a branch of the London, Midland and Scottish Railway running between Newport and Tredegar. There was no regular station, but for the accommodation of the employers and their men the railway company had made platforms on either side of the line, and ran a train each way at the time of the change of shifts, to bring in the new workmen and take away those going off duty. Access to this platform was only permitted to the respondent company's employees, on whose premises it abutted. Practically all the workmen travelled by the trains, the respondents having made arrangements with the railway company for the provision of and payment for the train, and the respondents issued to each workman a ticket in respect of which one penny per day was deducted from his wages.

On March 3, 1938, the appellant, having finished his day's work, went to the above-mentioned platform to enter the train, when, in the crush of his fellow workmen on the crowded platform, he was pushed off on to the line while a train was coming in, and lost his arm, which was caught between two of the coaches. In respect of his injury he claimed compensation under the Workmen's Compensation Act.

The county court judge and the Court of Appeal dismissed the claim, holding that they were precluded from deciding otherwise by reason of the decisions in *St. Helen's Colliery Co.* v. *Hewitson* (1) and *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (2) The workman appealed.

Gilbert Paull K.C. and *A. A. Warren* for the appellant. Leaving the premises of the employers is one of the incidents of a workmen's employment, and till the latter arrives at a place where members of the general public are entitled to be, he is in his employment ; in other words, a workman does not cease to be out of his employment until he becomes once more

(1) [1924] A. C. 59. (2) (1926) 19 B. W. C. C. 119 ; 135 L. T. 386.

a member of the public as distinguished from a person actually engaged in his employment. Applying those principles to the facts of this case, the appellant, in using the platform where the accident occurred, was using a place which was one not for the general public, but one exclusively for the use of the respondents' workmen. *St. Helen's Colliery Co., Ld.* v. *Hewitson* (1) is distinguishable inasmuch as in that case the workman met with his injuries some miles away from the place where he worked and while in a train which, though provided by agreement with the colliery owners, the workman was under no obligation to use. So also the position was the same in *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (2) The present case comes within the principle laid down in *John Stewart & Son* (1912), *Ld.* v. *Longhurst* (3) and *Foster* v. *Edwin Penfold & Co., Ld.* (4), namely, that the accident occurred at a place where he was by virtue of his contract of service. In *Davidson & Co.* v. *M'Robb* (5) Lord Dunedin said, in dealing with the circumstances there being considered, that "if . . . . the place at "which the accident happened was in any fair sense the access "to the ship, then the accident would be in the course of his "employment." The like would be true as to egress as is the case here. This case is clearly distinguishable from *Sparey* v. *Bath Rural District Council* (6), for there the accident occurred after the workman had mounted his bicycle and started off to ride home.

F. W. Beney and *Griffith Williams* for the respondents. In the cases cited relating to accidents to seamen, in each of them where the claim succeeded the workman had either reached a gangway which was part of the ship, or had to traverse private property against which the vessel was moored. In *Davidson & Co.* v. *M'Robb* (5), Lord Dunedin said (7): "In my view 'in the course of the employment' is a different "thing from 'during the period of the employment.' It "connotes, to my mind, the idea that the workman or servant

(1) [1924] A. C. 59.
(2) (1926) 19 B. W. C. C. 119; 135 L. T. 386.
(3) [1917] A. C. 249.
(4) (1934) 27 B. W. C. C. 240.
(5) [1918] A. C. 304, 323.
(6) (1931) 146 L. T. 285.
(7) [1918] A. C. 304, 321.

"is doing something which is part of his service to his "employer or master. No doubt it need not be actual work, "but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case "the taking of meals during the hours of labour: in the "servant's, not only the taking of meals, but resting and "sleeping, which follow from the fact that domestic servants "generally live and sleep under the master's roof." Here the appellant was doing nothing which was part of his service to the respondents. With the exception of *Foster* v. *Edwin Penfold & Co., Ld.* (1), there is no case of an accident happening outside the employer's premises, that is upon private property over which the workman has a right but not an obligation to traverse, in which the workman succeeded.

[LORD ROMER referred to Lord Macmillan's statement in *Northumbrian Shipping Co., Ld.* v. *McCullum* (2), that "it has "been recognised time and again that the sphere of a workman's "employment is not necessarily limited to the actual place "where he does his work. If in going to or coming from "his work he has to use an access which is part of his employer's "premises, or which he is only entitled to traverse because he "is going to or coming from his work, he is held to be on his "master's business while he is using that access."]

In that statement the assumption is involved that there is no other way of getting to or from the employer's premises. That is not the case here. The test is this: Whether the accident occurs while the workman is on the employer's premises or is engaged on his employer's work; at a place where the workman is compelled to be. In this case the line and the train were private property which it was optional for the appellant to use or not as he pleased. With regard to *Foster* v. *Edwin Penfold & Co., Ld.* (1), it is submitted that the view of the majority was wrong.

Gilbert Paull K.C. in reply. In *Davidson & Co.* v. *M'Robb* (3), Viscount Haldane said (4): "if the employee had reached the "ship or the ladders by which the ship was to be boarded he

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(1) 27 B. W. C. C. 240.
(2) (1932) 48 Times L. R. 568, 572.
(3) [1918] A. C. 304.
(4) Ibid. 317.

"might properly be taken to have been directed to use them as "being part of the vessel on which he was living as an incident "of his employment." So we say that in this case the platform was to be used as the approach to the colliery.

The House took time for consideration.

1940. May 30. VISCOUNT MAUGHAM. My Lords, the appellant was employed by the respondents at their Pochin colliery as a collier's helper. On March 3, 1938, he was unfortunate enough to suffer very serious personal injury by reason of an accident which happened after his day's work was done, whilst he was on his way home. The question is the well known one whether the accident arose out of and in the course of his employment.

The admitted facts are these. The colliery premises are partly on one side and partly on the other of the London, Midland and Scottish Railway from Newport to Tredegar. There is a halt known as Pochin Halt, consisting of two platforms, one on each side of the railway track, and means of access thereto. These premises are the property of the railway company and are maintained by them; but the halt is used only by persons and workmen employed by the respondents. The public have no right of access to the platforms, and the times at which trains stop at them are not shown on the railway time-table. Moreover, there are no means of access to the platforms except along the lines or over the respondents' premises. There is no ticket office at the halt, and tickets are obtained by men who desire to use the trains from an office of the respondents at the cost of 1*d.* a day return fare from and to Tredegar. The respondents make arrangements with the railway company with regard to the provision of trains stopping at the halt and payment for these trains, which, however, are owned, driven and managed by the railway company's servants. There remains to be stated one important agreed fact which is as follows: "No contractual "obligation or duty is placed upon the respondents' workmen "to use the train. There are other means of travelling to "colliery, e.g., by bus, walking or cycling, open to men working "at Pochin, and means of access to colliery from main road. "In fact practically all the workmen travel by train."

On March 3 the platform at the halt was crowded as the men were waiting to get into the train from the platform. The appellant was pushed off the platform as the train was coming in, with the result that his left arm got caught between two railway coaches. The arm had to be amputated above the elbow with the consequence of total incapacity. If sympathy for such a disaster to the appellant were admissible to affect our decision our task would be easier; but it is not, and in my opinion there are authorities of this House which lead to the inevitable conclusion that the accident did not arise in the course of the appellant's employment. That was the view adopted by the experienced county court judge and by the three judges in the Court of Appeal (Clauson and Luxmoore L.JJ. and Macnaghten J.), and I think it is my duty to state my agreement with them and to explain my reasons.

I will begin with the case of *St. Helen's Colliery Co.* v. *Hewitson* (1), which in my view finally decided the test to be applied in cases where the workman sustains an accident in coming to or leaving the place of his employment. The workman in that case, being a man employed at a colliery, was injured in a railway accident while travelling in a special colliers' train from his work to his home at Maryport; but he was not bound to use the train. Lord Buckmaster, who delivered the leading judgment, stated the position with his usual clearness and force. He agreed with the county court judge that it was an implied term of the contract of service that the train should be provided by the employers. He went on to say: "It was as a workman entering the service of "the employers that he obtained a pass enabling him to travel "and released his rights against the railway company. It was, "I think, an inseparable part of his contract of employment. "It does not, however, seem to me that this conclusion "determines the case in his favour. He had undoubtedly "the right to travel by the train—the right enjoyed by him

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(1) [1924] A. C. 59, 66.

"as a miner in the service of the appellants; but he was not "directed to travel by such a train; had he found it convenient "or desirable he could have travelled by other means." He then referred to the case of *Cremins* v. *Guest, Keen & Nettlefolds, Ld.* (1), where the Court of Appeal had decided that the phrase "in the course of his employment" was satisfied if the workman was in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. He rejected this test and decided that the words of the well known phrase could not be construed as including in their operation an accident whilst travelling by a train which the workman was under no obligation and no proved necessity to use. Lord Atkinson agreed in an elaborate speech in which he went through the previous decisions. He laid down the true test as being whether the workman was at the time and place where the accident occurred doing something in performance of a duty to the employer arising out of the contract of employment, bearing in mind that the word "employ-"ment" in such a case was used to cover and include things belonging to or arising out of it. He founded himself largely upon the decision of the majority of this House in the case of *Parker* v. *Ship Black Rock (Owners)*. (2) He held that the decision as to the right test was not in any way qualified or weakened by the decision in *Armstrong, Whitworth & Co.* v. *Redford*. (3) Lord Shaw dissented in a vigorous speech, holding in effect that it was sufficient for the workman to prove that the accident occurred at a place where by virtue of his contract of employment he had the right to be, since this was incidental to his employment. Lord Wrenbury agreed with the majority. He said, among other things, that he was content to deal with the case as if the train were "a special "train for which the employers paid, and in which the workman "was, by virtue of a term in his contract of service, at liberty to "travel if he wished to do so." "These facts," he said, "do "not to my mind indicate in any way that the workman was

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(1) [1908] 1 K. B. 469.
(2) [1915] A. C. 725, 728, 729, 731, 732, 733.
(3) [1920] A. C. 757.

"in the employment at the time. . . . There was in this no "obligation, and there arose in the workman no duty." He stated expressly what some of the other speeches only implied, that the case of *Cremins* v. *Guest, Keen & Nettlefolds, Ld.* (1), was wrongly decided. Lord Carson concurred shortly and, as I read his speech, on the same ground. The headnote states that *Cremins'* case (1) was overruled, and for myself I cannot see any room for doubt on this point.

That the principle of *Hewitson's* case (2) is not limited to cases where the workman is in actual occupation of means of transport provided by the employer, e.g., a train or omnibus, is, I think, clearly established by the decision of this House in *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (3) In that case the employers, by agreement with the Great Western Railway Company, provided trains by which the men could travel to the colliery. The coaches and the platform were owned by the employers. The men were expected to travel by the provided trains but not bound to do so. The employee on his way to work was going to such a train at about 5.35 A.M., and to do so he had to cross the line. He was knocked down by a light engine and suffered serious injury. The county court judge found that the man "when crossing the line to "the train was in the act of using the only reasonable and "practical means of access open to him when he met with the "accident." The award therefore was in his favour. Notwithstanding this finding, the Court of Appeal and this House decided on the authority of *Hewitson's* case (2) that there was no duty or proved necessity for the applicant to travel to his work by the train provided, and that the accident therefore did not arise out of and in the course of his employment. In this House, Lord Cave L.C. and Lord Sumner delivered speeches of some length, and Lords Phillimore, Carson and Blanesburgh concurred. Lord Cave stated the test as being this: "Was it the duty of this man—his duty to his employers "under his contract of service—to go to this platform and to "travel by this train ?" He took this as being the test from

(1) [1908] 1 K. B. 469.
(2) [1924] A. C. 59.
(3) 19 B. W. C. C. 119.

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the decision in *Hewitson's* case (1), and he added that where a broad principle has been decided by this House, it seemed to him to be very undesirable that it should be frittered away by fine distinctions. He said plainly that there was no real distinction between *Hewitson's* case (1) and the case then before the House, and he plainly saw no distinction between getting to the platform and travelling by the train. Lord Sumner was equally clear and definite. He began by saying that the decision of the House in *Hewitson's* case (1) showed quite clearly that in such a case it was essential for the workman to show that he was under a contractual obligation to travel by the train. He stated that that principle was binding on the House and must be followed. In my opinion none of the Lords who took part in the decision can have thought that there was any distinction for the purposes of the Act between a workman on his way over a railway line to catch a provided train and the position of such a man when actually in the train or on the platform waiting for it.

The same principle was applied in this House in the case of *London and North Eastern Railway Co.* v. *Brentnall* (2) ; only in that case the decision was in favour of the employee. I only mention it because it shows, as clearly as *Newton's* case (3) that the principle is not limited to cases where the employee is actually travelling in a train or other vehicle. It was the case of an engine driver who was under an obligation in the intervals between his journeys to go and stay at a hostel which had been provided by the railway company at Sheffield for the use of their men. The vital point was that the man had to take eight hours rest at the hostel, though subject to that he could do as he pleased. He went to the hostel, slipped on his way to the lavatory and injured himself. The question, of course, was whether the accident arose out of and in the course of his employment. Lord Buckmaster delivered the only judgment with reasons. Lords Warrington, Tomlin, Russell and Wright were content to concur. Lord Buckmaster based his opinion largely upon *Hewitson's* case. (1) He observed—and plainly with approval—that in that case Lord Wrenbury "made quite clear that there was all the "difference between the thing which a man, by virtue of his "contract of service, had the right to do and that which, by "virtue of his contract of service, he was compelled to do." He shortly stated the facts in *Hewitson's* case (1) and then added : "I find it very difficult indeed to distinguish between "the case where a man is compelled to take a particular means "of going to his work, and a case where a man is compelled "to go to a particular place where he has to rest between the "different spells of his work, and I cannot help thinking that, "if authority were required, *Hewitson's* case (1) is abundant "for the purpose." This accepts the same test of "nexus of "duty" as was established in *Hewitson's* case (1) though no travel by train or vehicle provided by the employers was involved.

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(1) [1924] A. C. 59.
(2) [1933] A. C. 489.
(3) 19 B. W. C. C. 119.

My Lords, with the greatest respect to those who think differently, I am not sufficiently ingenious to distinguish between the duty, if any, of the appellant to the respondents when he was standing on the platform or trying to get into the train and his duty as it would have been after he had entered the train at the halt. In both cases he was under no control by the respondents, nor bound in any way to wait for the train or to use it. He was where he was in either case in consequence of his employment ; but I do not think it was in its course that the accident occurred. In using these phrases I am merely adopting the words used by Lord Buckmaster in *Hewitson's* case. (2) The principle there laid down, and shown by the two subsequent decisions of this House to extend beyond the circumstance of actual travel in some provided train or other means of conveyance, is in my opinion binding upon us ; and like the county court judge and the Court of Appeal I find myself unable to escape from the conclusion that it covers the present case.

The noble Lords who took part in the three cases I have cited were well acquainted with the cases relating to accidents on quays or the sides of docks, beginning in this House with

(1) [1924] A. C. 59.

(2) Ibid. 67.

Stewart & Son (1912), *Ld.* v. *Longhurst.* (1) Lord Buckmaster and Lord Atkinson took part in that case, as they did in *Hewitson's* case. (2) I will not take up your Lordships' time by going through the various dock cases, not one of which, so far as this House is concerned, is inconsistent with the test of duty as being that which should be applied in determining whether an accident has arisen in the course of the employment. It may, however, be mentioned that the case of *Davidson* v. *M'Robb* (3) was decided mainly on the application of that test: see *Sir W. G. Armstrong, Whitworth & Co., Ld.* v. *Redford.* (4)

For the above reasons I am for my part in favour of dismissing this appeal.

LORD ATKIN. My Lords, this is an appeal from the Court of Appeal affirming a decision of Judge L. C. Thomas at the Tredegar County Court, who had made his award in favour of the employers in proceedings under the Workmen's Compensation Act. Once again this House has to consider the question whether injury by accident suffered by a workman arose "in the course of his employment." Various attempts have been made to formulate a universal test by application of which the course of employment could be ascertained, but on analysis they will be generally found not to cover the whole field. A man it is suggested is no longer in the course of his employment when he has left his employer's premises. But as has been often pointed out workmen are constantly employed on premises that are not their master's, e.g., most men engaged in the building trade and kindred operations and from time to time men engaged in engineering work, ship repairs, highway repairs and the like. *Webber* v. *Wansborough Paper Co.* (5) and *Stewart & Son* (1912), *Ld.* v. *Longhurst* (1) are cases where the injured workman who was awarded compensation was not on his employer's premises and was not even on the premises (the ship) on which he was employed to work.

(1) [1917] A. C. 249.
(2) [1924] A. C. 59.
(3) [1918] A. C. 304.
(4) [1920] A. C. 757.
(5) [1915] A. C. 51.

Another test is "duty": is he doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service. "The true ground upon "which the test should be based is a duty to the employer "arising out of the contract of employment, but it is to be "borne in mind that the word 'employment' as here used "covers and includes things belonging to and arising out of "it": per Lord Atkinson in *St. Helen's Colliery Co.* v. *Hewitson*. (1) "There is no doubt," said Lord Cave in *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (2), "that the test "of duty formulated by Lord Atkinson is the accepted basis "on which these questions ought to be dealt with." Be it so: but the word "duty" in the test has such a wide connotation that it gives little assistance as a practical guide. Employment, says the formula, "covers and includes things belonging to "or arising out of it." We are still left to discover what those things are. It is well settled that a man injured while taking refreshment on the premises at a permitted hour or otherwise relieving necessities of nature is in the course of his employment. It is a wide use of language that permits one to say that in those cases "he is doing something in "discharge of a duty to his employer imposed upon him by "his contract of service," even if you add the words "directly "or indirectly." And I find it difficult to take seriously the notion suggested by one noble Lord that in doing such things he is doing them so that he may better perform the work he is employed by his employer to do.

Duty with the vague connotation given to it above cannot be rejected: but it does not seem to point very clearly to the desired goal. There can be no doubt that the course of employment cannot be limited to the time or place of the specific work which the workman is employed to do. It does not necessarily end when the down tools signal is given, or when the actual workshop where he is working is left. In other words the employment may run on its course by its own momentum beyond the actual stopping place. There may be some reasonable extension in both time and space,

(1) [1924] A. C. 59, 71.

(2) 19 B. W. C. C. 119, 125.

as I pointed out in *Sparey* v. *Bath Rural District Council.* (1) What the nature of these extensions may be is a matter on which we have assistance from several decisions of this House. In *Webber* v. *Wansborough Paper Co.* (2) the workman, who was a seaman employed upon a ketch, having finished his work on the ship for the day was going off duty, passed from the deck to the wharf by a plank which rested on a fixed iron ladder attached to the wall of the quay, was climbing the ladder when he fell and was injured. Lord Haldane adopts a passage from the judgment of Buckley L.J. (3): " The law "being as Buckley L.J. points out in the case of *Cook* v. "*S.S. Montreal (Owners)* (4), that 'in the obligations con-"'tractually existing between master and servant it is part "'of the duty of the master to afford the workman when he "'is dismissed reasonable facilities for leaving the place of "'employment, and that if the servant is injured whilst "'availing himself of those facilities the master may be "'liable' the conclusion seems to me to be a very simple one." It is desirable to emphasize that the facility afforded by the master was passage over a ladder which belonged to the harbour authorities at Watchet where the ship was moored. So in *Stewart & Son* (1912), *Ld.* v. *Longhurst* (5), a carpenter employed in repairing a barge lying in dock, after finishing his day's work left the barge, and while walking in the dark along the quay fell off the quay and was drowned. The dock was private property, but the man's employers and their workmen had leave to pass through the dock on their way to or from the barge. His widow was held entitled to compensation. " The present "case belongs to a class of cases where the thing on which "the workman is employed is lying in a dock or other open "space to which he obtains access only for the purposes of "his work. Actual ownership or control by the employer of "the spot where the accident occurred is not essential. The "workman comes there on his way to or from his work, and "he *may* be regarded as in the course of his employment

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(1) 146 L. T. 285.
(2) [1915] A. C. 51.
(3) Ibid. 55.
(4) 6 B. W. C. C. 220.
(5) [1917] A. C. 249.

"while passing through the dock or other open space to or "from the spot where his work actually lies. Such passage is "within the contemplation of both parties to the contract as "necessarily incidental to it," per Lord Finlay L.C. (1) So Lord Dunedin (2) cites with approval the words of Pickford L.J. in the Court of Appeal: "The workman in this "case in order to get to the actual place of work had to enter "and leave premises on which he had no right to be and "no reason for being, except by the conditions of his employ-"ment, and in crossing them to encounter dangers which he "would not have encountered but for that employment." It must be noted that here again the workman had finished his time, had left the place where he was working, and was at a place which did not belong to and was not controlled by his employers, over which they had a mere license for themselves and their workmen. I need only refer to the similar case of *Northumbrian Shipping Co., Ld.* v. *McCullum* (3) in which Lord Macmillan in giving an opinion in which all the other Lords concurred says: "The seaman who on his "way back to the ship has left the public highway with its "risks common to all wayfarers and has entered the private "premises of the harbour in which his ship lies with its special "risks to which only those who have business at the harbour "are exposed seems to me to have come within the protection "of the Act: for if he sustains an accident while using this "access he sustains it by reason of risks incidental to his "employment which he would not have encountered but for "his employment." In argument it was suggested that in these cases the access provided was the only access available, and stress was laid upon the words of Pickford L.J. in the passage cited: "The workman *had* to enter and leave "premises on which he had no right to be": and to words in a previous passage of Lord Macmillan's opinion (3): "If "in going to or coming from his work he *has to* use an access "into." I do not think that any of the learned persons using or approving those words intended to confine this principle to cases where the only access is over third persons' properties. It is well established that the workman while leaving his employer's premises by one of alternative routes is at any rate while on the premises in the course of the employment: and it would surely be remarkable that if at the end of one of those permitted routes the employers had provided by license from third parties a route over such third parties' land for the very object of making the permitted route on the employer's premises an effective means of entrance or egress, the course of employment ceased on the employer's boundary, and the doctrine of the cases cited ceased to apply. If in the ship cases the vessel lay in a basin between two quays would the course of employment have ceased if the seaman used one of two, whereas it continued if he could only use one? It happens that this question arose and was decided in a case which came before the Court of Appeal in 1934, *Foster* v. *Penfold & Co., Ld.* (1) In that case the workman had parked his car on a wharf at the back of his employers' premises which his employers and their workmen were entitled to use. He was drowned in consequence of driving his car against a bollard on the wharf while leaving work by night. Lord Romer, then Romer L.J., said: "What he (the learned county court judge) has found is that "the deceased employee was not bound after his work had "ended to go home by his car. Neither Slesser L.J. nor "myself desire to intimate in any way that he was so bound "to go home by his car. He was however bound as part of "his service to leave the employers' premises, and he was "entitled to leave them by any permissible way and in any "permissible manner. He was leaving them by a permissible "way and in a permissible manner, and the accident occurred "before he had finally got free from those premises and was "in a public place, that is to say, on the public highway." I respectfully entirely agree with the way in which this is put, and I think that the decision is right and should be affirmed. In that case the majority of the Court of Appeal treated the passage over the wharf as being equivalent to a passage over the employers' premises. To avoid controversy as to employers' premises, the difficult application of which term I have already mentioned, I should myself prefer some such phrase as the area or the immediate area of the employment.

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(1) [1917] A. C. 249, 253.
(2) Ibid. 257.
(3) 48 Times L. R. 568, 572; 25 B. W. C. C. 284, 301.

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(1) 27 B. W. C. C. 240, 259.

But when all the cases have been looked at and considered one is finally brought back to the words of the Act, the course of the employment. The course of the employment begins when the workman enters the employment and it ceases when he leaves the employment: it being his duty to do both. "Going to" and "going from" the employment are not words which, without more, sufficiently accurately express the beginning and the ending of the employment in the sense which must be given to it in the light of the decided cases.

Now the application of what has been said above to the facts of the present case seems to me simple. The colliery employ numbers of men who work in shifts. The workmen's shift had come to an end in the afternoon, and the new shift had to take their places. It was the duty of the workmen in the old shift to leave their employment for the day: and it was essential in the interests of the employers to facilitate this process. The pit lies near a road by which the workmen could walk or bicycle to their homes, but it also abutted on a branch of the L.M.S. railway running between Newport and Tredegar. There was no regular station but for the accommodation of the employers and their men the railway company had made platforms on either side of the line, and ran a train each way at the time of the change of shifts to bring in the new men and take away the old. Access to the platform was only permitted to the employers' servants. It abutted on the employers' premises. It was approached by a bridge over the railway which belonged to the employers, from which steps which belonged to the railway company led down to the platform. Practically all the workmen travelled by the trains. The employers made arrangements with the railway company for the provision of and payment for the train, and the employers issued to each workman using the train a ticket which appears to be a daily return ticket for which the workman had deducted

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from his wages one penny per day. The injured workman, his work in the pit being over, proceeded to the platform to enter the train, and in the crush of his fellow workmen on the crowded platform to enter the train was pushed off as the train was coming in and lost his arm. On these facts it seems evident that the workman was making use of facilities which the employers had provided for leaving the place of employment: *Webber* v. *Wansborough* (1), and for this purpose was upon premises which his employers for the purposes of the employment had obtained for him a license to use, and on which he had no right to be and no reason for being except by the conditions of his employment: *Stewart & Son* (1912), *Ld.* v. *Longhurst.* (2) He had not left his employment, he was about to leave the employment in the manner provided by the employers: but until he was on the train the employment was not left, the course was still running. The learned county court judge and the Court of Appeal considered themselves bound by the decisions in *St. Helen's Colliery Co., Ld.* v. *Hewitson* (3), and *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (4) Those cases, with great respect, are cases of a different kind from this. In the former case a workman was travelling in a special train provided by the railway company by arrangement with the colliery company. He was travelling from his work, and the train ran off the line after it had proceeded some distance from the colliery station. It was plain that the course of his employment at the colliery had ceased: the man was on his way home. The journey on the train could only be brought back into the employment by showing that it was part of the contract of employment that the workman should travel by the train so that his employment would continue until he left the train. It was held that as there was no such term of the employment, inasmuch as the workman could travel by the train or not, the course of employment did not continue during the train's journey. In that case the man had clearly left the employment when he started on the train: in the present case as clearly he had not: he was on the platform with the intention of leaving but was prevented by the accident. *Newton's* case (1) is still clearer. The workman was crossing the railway line in order to catch a special train proceeding to the colliery, and was knocked over by a light engine before he got to the train. The spot was about three miles from the colliery. Though it had to be admitted that there was no express term of the contract of employment requiring the applicant to use the train, he relied upon a finding of the county court judge that the only practicable and reasonable means of access to the colliery was the train. This finding was rejected by this House on the ground that there was no evidence to support it: and with its disappearance disappeared any foundation for making the train journey part of the contract of employment. The conception of duty is rightly emphasized there, for unless there was a duty to use the train it was plain that the ordinary course of employment had in the one case ceased and in the other never begun. In the present case the duty to leave the employment in a permitted manner had not been completed. If the accident arose in the course of the employment, it was not and could not have been disputed that it arose out of the employment. The crowd of fellow workmen hustling into the train created a peril which appears to have been certainly caused by the employment.

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(1) [1915] A. C. 51.
(2) [1917] A. C. 249.
(3) [1924] A. C. 59.
(4) 19 B. W. C. C. 119.

It is, I think, evident that the learned county court judge and the Court of Appeal came to their decisions because they felt themselves bound by the cases of *Hewitson* (2) and *Newton.* (1) The facts are not in dispute and in my opinion admit of only one conclusion. The appeal should be allowed, the award set aside and the case remitted to the learned county court judge to award compensation. The appellant should have the costs here and in the Courts below.

LORD WRIGHT. My Lords, this appeal raises the ever recurring problem of the true construction, or rather the true application to the facts of the case, of the words of s. 1 of the Workmen's Compensation Act "accident arising out of and

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(1) 19 B. W. C. C. 119.

(2) [1924] A. C. 59.

"in the course of the employment." The particular aspect of the words here in question is not the causal but the time "element, the course of the employment." It is, when on the facts of this case did the employment terminate?

It has long been held that the course of the employment is not determined by the time at which a man is actually occupied on his work. There may be intermissions during the working hours when he is not actually working as, for instance, times for meals or refreshment, or absences for personal necessities. And the course of the employment may begin or end some little time before or after he has downed tools or ceased actual work. The simplest case is when a man in a large factory or works has to go a substantial distance before he leaves his employer's premises and goes into the public street. As Lord Dunedin said in *Stewart & Son* (1912), *Ld.* v. *Longhurst* (1): "No one, for instance, would doubt that if a "collier was injured in the cage on his way to the face at "which he was to work that the injury arose in the course of "his employment, though the face might be a mile away from "the pit bottom: nor would anyone doubt that if the same "man were starting from his house in the village and was "injured while in the street before he approached the precincts "of the colliery the opposite result would be arrived at." Lord Dunedin is distinguishing between risks which a man incurs as an employee and those which he incurs as an ordinary member of the public. To the same effect Lord Atkinson (2) said: "In argument some distinction was "attempted to be drawn between the case where the workman "has to traverse the private property of his employer to get "to his work, and that where to do so he has to traverse the "private property of another with the consent of that other. "I do not think that is a sound distinction. When a man "walks along the public streets to get to his work he is doing "something which he has a perfect right to do irrespective "altogether of his employment. The right does not spring from "his employment at all. It belongs to him as a member of the "public." Lord Atkinson is drawing the same distinction as Lord

(1) [1917] A. C. 249, 256. (2) Ibid. 258.

Dunedin. I find in these expressions of which other instances may be found in the authorities, a general criterion for deciding when the employment begins and ends. In *Stewart's* case (1) the man was employed on a barge which was in a dock. To reach it he had to traverse the premises of the dock company over which his employer had no control, but had secured permission for the man to pass backwards and forwards from and to his work. He was injured while doing so in consequence of a risk attaching to those premises. It was held that the accident arose out of and in the course of his employment. Lord Dunedin (2) quoted with approval the words of Pickford L.J.: "The workman in this case, in order to go "to the actual place of work, had to enter and leave premises "on which he had no right to be and no reason for being "except by the conditions of his employment and in crossing "them to encounter dangers which he would not have "encountered but for that employment." I have quoted these passages from *Stewart's* case (1) because they seem to me to be precisely applicable to this case, save in one respect which does not seem to me to constitute a distinction. In *Stewart's* case (1) the workman could not get to the barge save by crossing the dock premises. In the present case Weaver could have left the colliery without resorting to the platform. In fact, however, "practically all the "workmen used it." It is the employers' duty to provide means of access to and egress from the work. Both access and egress are in this respect on the same footing. In *Parker* v. *Ship Black Rock* (*Owners*) (3), Lord Parker, while holding against the man's claim, was willing to concede that the arbitrator might have found that the quay which the deceased seaman was using to regain his vessel was the proper and usual method of regaining the ship and thus might be considered as the access to the ship, so that an accident happening during the course of using that access might be within the cases an accident in the course of the employment. That is not an express decision but indicates that it may be enough if the access was proper

(1) [1917] A. C. 249.
(2) Ibid. 257.
(3) [1915] A. C 725, 730.

and usual. There are several decisions of this House which recognize that there may be a sort of notional extension of the employer's premises (or more correctly the place where the employer is carrying on the particular work which may include a place such as the barge in *Stewart's* case (1) or the spot on the highway in *Sparey* v. *Bath Rural District Council* (2)) so as to include an area which the workmen pass and repass in going to and leaving the actual place of work.

Now it is, I think, true to say that in the various authorities, at least in this House, where this notional extension has been recognized, the actual or assumed state of things has been that there was no alternative way of access or departure. In one of the latest of these authorities (which have all been cited at great length and which I need not discuss in detail) it was said in *Northumbrian Shipping Co.* v. *McCullum* (3) by my noble and learned friend Lord Macmillan in a speech concurred in by the other Lords, that "if in going to or coming "from his work he has to use an access which is part of his "employer's premises or which he is only entitled to traverse "because he is going to or coming from his work, he is held "to be on his master's business while he is using that access." Lord Macmillan uses the word "has" meaning, I presume, that it was the only access. That was so in the facts of that case. But does the fact that there is an alternative access exclude the same result, that is, assuming that the access is proper and usual and is provided by the employers? The words of the Act are very general, no doubt designedly so. Experience has shown how infinitely various may be the facts to which the words are to be applied. Lord Buckmaster in *Stewart's* case (1) uttered a warning against the mistake involved in attempting to define a fixed boundary between the cases which are within the statute and those which are without. "This," he said (4), "it is almost impossible to "achieve. No authority can with certainty do more than "decide whether a particular case upon particular facts is or

(1) [1917] A. C. 249.
(2) 146 L. T. 285.
(3) 25 B. W. C. C. 284, 301.
(4) [1917] A. C. 259.

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"is not within the meaning of the phrase." The realities of each case must be regarded. Is there any difference in substance if the man in leaving the work has a choice of two permitted ways over adjoining premises before he reaches the public highway instead of only one ? I cannot see why there should be. Nor could the Court of Appeal in *Foster* v. *Penfold & Co.* (1), where the accident befell a man when using a permitted means of egress at a place where he was not allowed to go as a member of the public but only in virtue of his employment. It was held to be immaterial that there was an alternative way of egress. The man had parked his car on a private wharf adjoining the employers' premises. He was not bound to go home by car, though to do so was usual. My noble and learned friend Lord Romer, then Romer L.J., in holding the case to be within the Act, said (2) : "He was, however, bound as part of his service to leave the "employers' premises, and he was entitled to leave them by "any permissible way and in any permissible manner. He "was leaving them by a permissible way and in a permissible "manner, and the accident occurred before he had finally got "free from those premises and was in a public place, that is to "say, on the public highway." I agree completely with that statement. I think it applies to the facts of the present case. In my opinion when Weaver got into the train and not before, he was in what may be called a public place, that is on a public railway which he was entitled by contract with the railway company to use like other members of the public. The platform was not a public place. It was specially provided by arrangement with the employers for the use of the respondents' men. The public had no right of access to it. There was no public means of access to it. It was provided solely as a means of access and egress to and from the colliery. There was no contractual obligation on the man to use it, but there was clearly a practical compulsion, because practically all the men used it. It was beyond question a proper and usual means of access and egress, provided by the company for that very purpose. I cannot see why the

(1) 27 B. W. C. C. 240.

(2) Ibid. 259.

bare possibility that a man may leave the work by road, walking or bicycling, can make the difference. Weaver, when he was knocked off the platform, was still surrounded by his fellow workmen, and the risk of being knocked off by the jostling crowd was a risk still incidental to his employment. The platform was in that respect a dangerous place, just as much as the dock premises which the man was crossing were in *Stewart's* case. (1) He had not become an ordinary member of the public or disentangled himself from his employment. He was accordingly still in the course of his employment.

I think the appeal should succeed though with all the doubt which is proper to be felt when I am differing from the Court of Appeal. The Lords Justices refer to *Foster* v. *Penfold & Co.* (2), but do not show clearly how they distinguish it. Their decision is determined by their view that the relevant and governing authority was *St. Helen's Colliery Co.* v. *Hewitson* (3), followed in *Newton* v. *Guest, Keen & Nettlefolds.* (4) If I thought that *Hewitson's* case (3) did govern this case, I should unhesitatingly follow it, whatever my own view was. But I agree, if I may say so, with the decision in *Hewitson's* case. (3) The essential facts were that the man was travelling on a train on his way home. He was injured when, some miles from the colliery, his train came into collision with another. I do not see how it could be said that he was using a permitted means of egress from the colliery. He was on his way home on a public conveyance. He had no greater right to claim that his employment was continuing than if he had been bicycling home on the public street when the accident happened. The fact that the colliery had arranged with the railway company to provide a special train for the men did not extend the course of the employment, as it would have done if the men were bound by their contract of employment to use the train, or, it may be, if there was no other possible way for the men to get to and from their home or from or to the colliery, as was the case in *Richards* v. *Morris.* (5) Lord Buckmaster in *Hewitson's*

(1) [1917] A. C. 249.
(2) 27 B. W. C. C. 240.
(3) [1924] A. C. 59.
(4) 19 B. W. C. C. 119.
(5) [1915] 1 K. B. 221.

case (1) sums up the position thus: "I think it would be "wrong, having regard to the purpose of this statute, as dis-"closed both in its construction and in its history, to narrow "the meaning of the words used. They are general words "intended, as I regard them, for a wide and general application; "but I find myself unable so to construe them as to include in "their operation the right of travelling by a train which the "workman was under no obligation and no proved necessity "to use." It was natural and proper in that case, as also in *London and North Eastern Ry. Co.* v. *Brentnall* (2), to emphasize the question of obligation and duty. Unless there was some obligation and duty the accident could in no sense be connected with the employment. If there was an obligation or duty, as there is in the case of a man going about the public street under his employer's orders, he would be entitled to compensation if injured by an ordinary street risk. So also if sent on duty by train. But in a case like the present where a man was simply using the usual and proper way of egress provided for leaving the colliery, I do not see the relevance of the idea of duty except in the artificial sense that a man owes his employers a duty to come to his work and to go away when his work is ended. I think it is in some such sense that duty has been referred to in certain of the cases of this nature. Similarly in *Armstrong Whitworth & Co.* v. *Redford* (3) it was said that the girl who slipped on the canteen stairs was endeavouring to comply with the duty of punctuality. But the idea of duty was in the strict sense of the term relevant in *Hewitson's* case (4), and the absence of duty or obligation to be in the train took the case outside the Act. With the greatest respect the position in the present case is quite different and I am unable to agree with the Court of Appeal when they say that the appellant could only succeed if he could show that he was on the platform by reason of an obligation subsisting between himself and his employers to avail himself of the facilities afforded by the halt and the stoppage of trains thereat. Nor do I agree that it is relevant to observe that when he stepped

(1) [1924] A. C. 67.
(2) [1933] A. C. 489.
(3) [1920] A. C. 757.
(4) [1924] A. C. 59.

from the colliery premises (I suppose when he stepped from the bottom step of the stairway on to the platform) he was free until the next day from any nexus of obligation to his employers. That is equally true in any relevant sense of the whole time after he ceased work, because, as soon as he did so, he would not have been bound to obey orders to work. He had finished his allotted day's work and was, apart from some emergency, free to go home. But all the same the course of employment admittedly continued after he left his actual work and was engaged in the process of leaving the premises. In the same way a man in the intervals during the day's work does many things, such as taking refreshment or moving about for personal reasons, which cannot in any ordinary sense be said to be in discharge of a duty or obligation to his employers. Yet he may be entitled still to claim that the course of his employment continues. I deprecate the use in this connection of such words as "nexus of obligation." If they mean the same as "the course of the employment," they are superfluous. If they mean something else, they may stultify the operation of the Act.

I think the appeal should be allowed.

LORD ROMER. My Lords, of all the problems to which the Workmen's Compensation Acts have given rise, by no means the least difficult is that of determining when a workman's employment may be said to begin and when to end. For it has long been settled that his employment may begin before he embarks upon the actual work that he has been engaged to do, and may not end the moment that the day's work is finished. In the case of *Cross, Tetley & Co.* v. *Catterall* (1), decided in 1905, the workman was engaged to work in a colliery which was approached by a bridge built by the employers over a canal for the convenience of their employees, and the workman fell into the canal from the bridge while going to his work. In giving his opinion Lord Halsbury appears to have said this: "I do not agree that "his employment only begins at the moment he strikes the

(1) (1905) 18 B. W. C. C. 445*n*.

"coal with his pick. I think the man was really in the "employment the moment he reached the bridge. He was "doing something on his master's behalf; that is to say, he "was on his way to the colliery for the purpose of working." The result would, of course, have been the same if the accident had befallen the workman when crossing the bridge on his way home at the end of his shift.

The task of administering the Acts would be considerably easier if it could be deduced from this that, in the case of a workman not residing upon his employer's premises, his employment begins when he leaves his home in the morning for the purpose of going to his work, and only ceases when he gets home again after the day's work is done. But such is not the law. What Lord Halsbury said was that in the case before him the workman was in the employment the moment that he reached the bridge. As was said by Lord Finlay in *Longhurst's* case (1), to which I shall have to refer in detail later on, the decision in *Catterall's* case (2) "established that the "employment *may* begin as soon as the workman has reached "his employer's premises or the means of access thereto. "And in the same way the employment *may* be considered "as continuing until the workman has left his employer's "premises." Lord Finlay did not add "or the means of "access thereto" but obviously this addition is to be implied. It is also plain that by the expression "employer's premises" he meant the premises upon which the workman is employed to work; for such premises may or may not be the premises of the employer. Indeed, as will presently appear, *Longhurst's* case (1) itself was one in which the workman was engaged on work in a ship that did not belong to his employers. But whether the premises upon which the workman is employed belong to the employer or not, there cannot in general be much difficulty in ascertaining what those premises are. The real difficulty is in ascertaining what are the "means of "access thereto" within the principle to which Lord Finlay was referring. The clue to the solution of this question is I think to be found in the words of Lord Finlay that immediately follow the passage that I have just cited. "The "case would be different," he said, "if the workman was at "the time of the accident on the public highway on his way "to or from his work. His employment cannot be considered "as having begun if he is merely in transit in the public "street or road to or from his employer's premises. Of "course, if his employment were of a kind which is pursued "on the highway he might be in the course of his employment "while there, but I am speaking of cases in which he is in "the public way merely in exercise of the public right of "passage there on his way to or from his employer's. The "present case belongs to a class of cases where the thing on "which the workman is employed is lying in a dock or other "open space to which he obtains access only for the purposes "of his work." There must, therefore, be excluded from the means of access any part of the route that is open to the public at large. But if the workman be using a means of access to the place of his work that is not open to the public at large, but is merely open to him by reason of his employment, the case is different, and in using those means of access the workman may well be acting in the course of his employment, whether the access be over premises belonging to his employer or over premises belonging to a third party. That this is so was clearly laid down in *Longhurst's* case. (1)

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(1) [1917] A. C. 249, 252.

(2) *See* 18 B. W. C. C. 445*n*.

The material facts in that case were as follows: The employers were engineers and ship repairers and were engaged in effecting repairs to a barge which was lying in the South West India Docks. The workman who was a carpenter was in their employment on this work. The docks were under the control of the Port of London Authority: they were not open to the public for traffic, but the appellants and their workmen had the permission of the authority to pass through the docks on their way to and from the barge on which they were at work. One evening in November the workman left the barge at the conclusion of his day's work, and was proceeding homewards in the darkness by way of the quay, when he unfortunately missed his way, fell into the dock, and was drowned. His widow thereupon claimed compensation from the employers. The claim was disallowed by the county court judge who held that when the deceased got off the barge on to the quay the relationship of master and servant ceased as completely as if he had got off the barge on to the high road. The Court of Appeal reversed this judgment of the county court judge, and on appeal to your Lordships' House their decision was affirmed. Lord Dunedin in his speech quoted with approval the following words that had been used by Pickford L.J. in the Court below: "The "workman in this case in order to get to the actual place of "work had to enter and leave premises on which he had no "right to be and no reason for being, except by the conditions "of his employment, and in crossing them to encounter dangers "which he would not have encountered but for that employ-"ment." Lord Atkinson said this (1): "In argument some "distinction was attempted to be drawn between the case "where the workman has to traverse the private property "of his employer to get to his work, and that where to do "so he has to traverse the private property of another with "the consent of that other. I do not think that is a sound "distinction. When a man walks along the public streets to "get to his work he is doing something which he has a perfect "right to do irrespective altogether of his employment. The "right does not spring from his employment at all. It belongs "to him as a member of the public." I have already cited the observations of Lord Finlay in the same case.

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(1) [1917] A. C. 249.

It is instructive to compare with *Longhurst's* case (1) the decision of your Lordship's House in the case of *Davidson & Co.* v. *M'Robb.* (2) The workman there was the chief engineer of a ship lying in a part of a harbour which was ordinarily a public one but had been taken over temporarily by the Admiralty and closed to the public and to which access was granted only by an Admiralty pass. On returning to his ship one night by way of the harbour quay the workman fell into the water and was drowned. It was held (Lord Finlay dissenting) that his dependants were not entitled to recover compensation. Lord Finlay considered the case to be indistinguishable from *Longhurst's* case (1), but the rest of their Lordships distinguished that case on the ground, as I understand it, that the public harbour did not become a private means of access to the ship by being taken over temporarily by the Admiralty. All their Lordships, however, recognized the distinction that had been established in *Longhurst's* case (1) between a public and a private means of access to the place where a workman does his work.

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(1) [1917] A. C. 249, 258.

(2) [1918] A. C. 304.

My Lords, in view of these cases it must, in my opinion, be taken to have been settled by the authority of this House that, after a workman has finished his day's work and starts out on his way home, his employment continues while he is traversing the premises on which he has been working and any private means of access thereto which he is only entitled to use by reason of his status as a workman, but that, unless engaged on some special errand for his employer, which necessitates his being there, his employment ceases when he reaches a place to which the public have a right of access such as the public street. From that moment he loses his identity as a workman and becomes one of the general public. A similar principle, of course, applies to a workman on his way to his work. In the words of Lord Buckmaster in *Sparey* v. *Bath Rural District Council* (2), "when the workman is no longer under any control "and is in all respects and for all purposes in the same position "as an ordinary member of the public enjoying the same liberty "and sharing the same risks, the danger he there encounters "is one which other members of the public equally share." In the same case Lord Russell of Killowen said in reference to the workman who there failed to establish his claim to compensation: "He was riding home not along his employer's "premises in virtue of his status as an employee, but along the "highway in virtue of his status as a member of the public." In all cases, therefore, where a workman on going to or on leaving his work suffers an accident on the way the first question to be determined is whether the workman was at the place where the accident occurred in virtue of his status as a workman or in virtue of his status as a member of the public. It was owing to the fact that this question was answered in favour of the workman in *Northumbrian Shipping Co.* v. *McCullum* (1) that he succeeded in his claim for compensation. The workman in that case was a seaman returning to his ship the access to which was obtained by passing over a private quay. The case therefore fell within the principle to which I referred just now, a principle that has never been enunciated more clearly than it was in the speech of Lord Macmillan: "It has been recognised "time and again that the sphere of a workman's employment "is not necessarily limited to the actual place where he does "his work. If in going to or coming from his work he has to "use an access which is part of his employer's premises or "which he is only entitled to traverse because he is going to or "coming from his work, he is held to be on his master's business "while he is using that access. Take the analogy of a domestic "servant. . . . . I imagine no one would doubt that a maid-"servant returning from her night out and meeting with an "accident in the private avenue of her master's house, though "at a point a quarter of a mile from the house would be entitled "to compensation. And equally so if she suffered an accident "on a private access to the house which, although not the "property of her master, she had permission to traverse only "as one of the household servants. In the case of a town house "in a street it would doubtless be necessary to draw the line "between the public highway and the master's house with "just the same precision as the line is drawn between the "public harbour and the ship. If the maidservant fell "on the area steps she would presumably be within the Act, "but if she fell on the pavement a few feet away she "would presumably be outside the Act, always of course "assuming that she was not on some errand for her master at the time."

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(1) [1917] A. C. 249. (2) 146 L. T. 285, 286; 24 B. W. C. C. 414, 418.

My Lords, upon this principle it would seem reasonably plain that the appellant in the present case was entitled to the compensation that he seeks. After finishing his work at the colliery he proposed returning to his home by train. In order to get to the train he passed directly from the colliery premises on to a platform which was the only means of access from the colliery to the train, and upon which he had no right to be except by virtue of his status as an employee of the colliery. While on the platform, and by reason of his being on the platform, he met with an accident. In my opinion it was an accident arising out of and in the course of his employment. The county court judge and the Court of Appeal, however, considered that they were precluded from giving the appellant relief by the decisions of your Lordships' House in *Hewitson* v. *St. Helen's Colliery Co.* (1) and *Newton* v. *Guest, Keen & Nettlefolds.* (2)

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(1) 48 Times L. R. 568, 572; 25 B. W. C. C. 284, 301.

My Lords, if I am to accept the conclusion that the effect of these two decisions is to deprive the appellant in the present case of any right to compensation under the Act, I must, as it seems to me, necessarily suppose that they lay down a principle inconsistent with the principle that had already been established by your Lordships' House in *Longhurst's* case (3) and accepted in *M'Robb's* case (4), and one that has since been affirmed and applied in *McCullum's* case. (5) As this is an altogether impossible supposition it is necessary to ascertain what were really the grounds of the decision in the *Hewitson* (1) and *Newton* (2) cases.

I need not state in detail the facts in *Hewitson's* case. (1) It is sufficient to say that if in the present case an accident to the appellant had occurred while he was actually in the train travelling towards his home, the case would have been in all material circumstances comparable to *Hewitson's* case. (1) The two cases would have been indistinguishable. The workman in *Hewitson's* case (1), however, failed upon the ground that he was under no contractual obligation to his employer to be in the train. All their Lordships who were responsible for the decision were at pains to ascertain whether Hewitson was or was not under any such obligation. It would seem to follow from this that they did not regard Hewitson when in the train as being engaged upon one of those acts that are always considered as being part of a workman's employment because they are incidental to the employment proper. They must have regarded him, in other words, as a workman who had left the scene of his labour and "the "means of access thereto" within the meaning attributed to those words in the cases to which I have previously referred. For when a workman is engaged in performing an act that is merely incidental to his employment proper it is hardly, if ever, true to say that he is under a contractual obligation to his employer to perform it. When, for instance, he is engaged in taking refreshment on the premises during his dinner hour, it is not accurate to say that he is performing some contractual obligations or duty towards his employer. Nor can that accurately be said of a workman going home after the day's work is finished. It is well settled, moreover, that a workman leaving or going to the scene of his actual work may use any one of two or more alternative routes over the premises of his employers. But he is under no obligation to his employer to use one route rather than another. Take, too, the case of premises that open directly on to a public street. If a workman on finishing his work is under a contractual obligation to leave the premises, he must, when he steps on to the highway on leaving, be under a contractual obligation to be there; and any accident he may meet with by reason of his being there would be an accident arising out of and in the course of his employment. That this is not so is made quite clear in the authorities that I have already cited.

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(1) [1924] A. C. 59.
(2) 19 B. W. C. C. 119.
(3) [1917] A. C. 249.
(4) [1918] A. C. 304.
(5) 48 Times L. R. 568; 25 B. W. C. C. 284.

The truth of the matter is that in all these cases of a workman going to or leaving the scene of his labours, the necessity of deciding the question whether, at the time of the accident, the workman is acting in pursuance of a duty that he owes his employer, i.e., is performing some contractual obligation towards his employer, only arises when the workman at that time has left or has not yet reached, as the case may be, the scene of his labours or "the means of access thereto." If the maidservant in Lord Macmillan's illustration meets with an accident before she has reached the public highway, she may in a proper case recover compensation, even though she is

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leaving her employer's premises because it is her night out. She is engaged in doing something that is merely incidental to her employment proper. She will not be refused compensation merely because she owes no duty to her employer to go out. But if the accident happens after she has reached the public highway the question at once arises whether she is there in performance of her duty to her employer such as posting his letters or doing some shopping on his behalf.

Now an employee after he has left the scene of his labours and "the means of access thereto" may find himself upon a highway or a public railway station. He will by then have fully performed the act of going home that is incidental to his employment. Whatever he does thereafter whether on foot, or by omnibus, or by train, he does in virtue of his status as a member of the public and not in virtue of his status as an employee. But suppose that when continuing his journey home he makes use of the highway or the railway not by travelling in a conveyance available to the public at large but in a conveyance that is only available to him in virtue of his status as an employee. In such a case is he still performing the act of getting home that is incidental to his employment? In view of *Hewitson's* case (1), as I read it, this question must be answered in the negative. If it had not been answered in the negative in *Hewitson's* case (1), it would not, as I have been endeavouring to show, have been necessary for their Lordships to consider the question whether Hewitson did or did not owe a duty to his employers to be in the train. I am, therefore, with all deference to those who think otherwise, unable to regard *Hewitson's* case (1) as having any bearing upon the one that your Lordships are now called upon to decide. Still less has *Newton's* case (2) any such bearing. The workman there, after leaving his home in order to return to the colliery, was making his way towards the place from which the train was to start, and while doing so met with an accident. He had not even entered the train. It seems to me to have been a very plain case.

My Lords, for these reasons I am of opinion that the appeal

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(1) [1924] A. C. 59.

(2) 19 B. W. C. C. 119.

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should be allowed and an order made in the terms that have been indicated by my noble and learned friend Lord Atkin.

Lord Porter. My Lords, Wilfred Weaver has claimed and been refused workman's compensation by a county court judge and by the Court of Appeal. His claim was against the Tredegar Iron and Coal Co., Ld., who carry on the business of colliery proprietors at Pochin Colliery which lies between Newport and Tredegar. At the time of the accident he was a collier's helper living at Tredegar. The facts are not in dispute and were agreed as follows: The colliery premises at Pochin are partly on one side and partly on the other side of that portion of the London, Midland and Scottish Railway which runs from Newport to Tredegar. On the strip of railway property which bisects the colliery premises there is not only a railway line but also a platform known as Pochin Halt which is owned and maintained by the railway company. The railway company do not permit the general public to use the halt and there is no means of access to the platform except from the colliery premises. By arrangement between the respondents and the railway company trains are provided and paid for to take such employees as desire to use them to Tredegar or Newport. The halt is not shown on any of the company's regular passenger time tables, but the trains are owned, driven, and managed by the railway company's servants. The employees do not pay any fare to the railway company direct; the respondents deduct from the wages of those who use the trains 1*d.* per day as return fare. In addition to this means of access to or egress from the colliery, the employees are entitled to proceed to or from it by an entrance leading to the main road and the workmen can choose either method of reaching or departing from their work at their pleasure. They are under no contractual obligation to use the trains but in fact nearly all the workmen do so travel.

On March 3, 1938, the appellant in the ordinary routine at the end of his day's work went to the halt platform and waited for the train. When it arrived the appellant in the press of workmen pushing their way, fell off the platform and his left arm was caught between two railway coaches and injured, with the result that it had to be amputated above the elbow. It is admitted that he was totally disabled by this accident.

The appellant proceeded to arbitration claiming that the accident had arisen out of and in the course of his employment. It is not, I think, disputed that if the injury had been received in the course of the man's employment it also arose out of it. It is clear that while on the platform he was exposed to the danger of either falling or being pushed off it and of being struck by a train which might happen to be there. The respondents, however, maintained that the accident did not arise in the course of the man's employment. The county court judge held that the respondents were right and as his judgment is short I quote it in full. "I find this case "indistinguishable—almost fact for fact—with *Hewitson's* "case (1), where a special train was provided for work people, "and there is the other decision of the House of Lords in the "case of *Newton* v. *Guest, Keen & Nettlefolds* (2), in which "Lord Cave reaffirms the principle that the supreme test "is duty and as there was obviously no duty in this case "for this young man to be there I think this application "must be dismissed. There must be an award in favour of "the respondents with costs on Scale 'B.'"

To my mind it is clear that in arriving at this conclusion the county court judge is not making any independent finding of fact, but merely drawing the deduction that the accident could not be said to arise in the course of the man's employment, because he felt himself bound by two decisions of your Lordships' House to come to that conclusion. Of course, if he was right in thinking this case to be indistinguishable from those upon which he placed reliance, your Lordships are bound by the findings and reasonings contained in them.

Eventually it will be necessary to consider how far those cases either in their reasoning or facts are analogous to the case now under consideration, but before dealing with that question I should desire to express the view which I should

(1) [1924] A. C. 59. (2) 19 B. W. C. C. 119.

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have formed of the present case were I untrammelled by those decisions.

The test which is put by the learned county court judge is whether there was any duty on the part of the workman to travel by the train in question and he comes to the conclusion that there was obviously no duty in the present case. In some cases no doubt it may be helpful to consider whether the man owed a duty to his employers at the time of the accident, and indeed if duty be construed with sufficient width it may be a decisive test. But so construed to say that the man was doing his duty means no more than that he was acting within the scope of his employment.

The man's work does not consist solely in the task which he is employed to perform, it includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employer's premises to another, and periods of rest may all be included. Nor is his work necessarily confined to his employer's premises. The man may be working elsewhere, e.g., in building a house or in work on the road or in work at a dock. The question is not, I think, whether the man was on the employer's premises, it is rather was he within the sphere or area of his employment. No doubt the question of what is incidental to the man's employment and what is the area or sphere of his work are matters which are often difficult of ascertainment and may sometimes turn on fine distinctions. In the ordinary case when a workman is employed on his master's premises he ceases to be in the course of his employment when he has left those premises and reached the public street. And equally he may have left those premises if he reaches a place which is not public but from which he like others who are not engaged in the same employment can proceed to his home. Nor in my view does it make any difference that when he reaches the public street he is conveyed from the premises in a coach provided by his employer, nor that when he reaches the place which is not public he is carried in a railway train or other conveyance for the provision of which his employer has made the necessary arrangements. In either of the latter cases he is not in the course of his employment though he is using facilities for reaching his home which are granted to him by his employer. It is true that he is being carried in a vehicle which has either been provided by his master or for the provision of which his master has arranged, but he is being conveyed over ground which is not confined to the use of himself or his fellow employees and, generally at any rate, unless he is compelled to travel in that conveyance the course of his employment has ceased. The fact, however, that he is using a facility and not a compulsory method of progression is not decisive. If on the premises there is a staircase and a moving stair and he is entitled to use either, the moving stair is a facility, yet if in getting from one part of the premises to another he uses the moving stair and is injured he is in the course of his employment. Of course, if the facility is something that does not come into operation until after the course of his employment has otherwise ceased, the fact that the employer supplies it does not make the workman's use of it a use in the course of his employment. But if it is in the course of his employment, the fact that he might have chosen an alternative method does not disentitle him to recover.

Now it is in the course of his employment and if the phrase be used, it is part of his duty both to go to and proceed from the work upon which he is engaged, and so long as he is in a place in which persons other than those so engaged would have no right to be and indeed in which he himself would have no right to be but for the work on which he is employed, he would, I think, normally still be in the course of his employment. No very logical line can be drawn. In a sense it might be said that every man as soon as he proceeded from his home towards the works at which he was employed was in the course of his employment. With equal plausibility I think it might be said that he was not in the course of that employment until he had begun to undertake the task upon which he was engaged. Neither view is a satisfactory one, and as I understand it, your Lordships' House has taken a middle course in holding that the man as a rule has not yet entered upon the course of his employment while he is merely proceeding towards the area in which his work is carried on, but has done so when he has arrived at his employer's premises or some place to which he would not be entitled to have access were it not for that employment. I am not, of course, considering cases in which the necessities of the work compel him to traverse the public streets or other public places.

The difficulty then is to decide at what point the employment begins and ends.

The test suggested on behalf of the respondents was as follows. When an accident happens whilst the workman is arriving at or leaving the premises at which he does his work, an accident which happens before he reaches them or after he has left them arises out of and in the course of his employment if he was bound to proceed by the way he did by an express or implied term of his contract provided that that way was private property.

It was admitted that if there were several methods of egress from the place in which he was employed, he was still in the course of his employment in using any of those methods provided they were situated upon the owner's premises, but it was said that if one or any of them were off those premises the workman not being obliged to use such a method of leaving his work was no longer to be considered to be in the course of it after he had actually left the premises themselves.

This result is said to follow from the two cases of *St. Helen's Colliery Co., Ld.* v. *Hewitson* (1), and *Newton* v. *Guest, Keen and Nettlefolds, Ld.* (2) The actual facts in these cases were widely different from those in this. In the first the man had boarded a train for the provision of which his employers had made arrangements with the railway company, and before the accident occurred was some six miles on his way towards his work or home (from the report it is not clear which). In the second he had not even reached the halt provided by his employers on the railway by which he was permitted to travel to his work but was crossing the railway line to reach it when he was injured by a passing train. In either case it could

(1) [1924] A. C. 59.

(2) 135 L. T. 386; 19 B. W. C. C. 119.

readily be asserted that the employer was but providing a facility in order to enable the man to reach or leave the area of his employment: it would be difficult to say that he was in the course of the employment itself. In the present case, on the contrary, the place at which the accident happened was contiguous with the employers' premises, could be reached only through them, and was open only to their workmen.

There is authority in your Lordships' House for the statement that a workman who has reached a point on his employer's premises, even though that point be a long way from the place at which his work begins, is already in the course of his employment, and further authority for the proposition that it makes no difference that the spot he has reached is not the employer's premises themselves but some place over which his right to proceed is attributable solely to the work upon which he is engaged. But, it is said, though this last statement be true, it only applies where that place is the only method of approach to or departure from the premises where the work is carried on. I find it difficult to see why, logically, this should be so. The workman has to leave the premises: the employer has arranged that he may go by Exit A or Exit B: he chooses A and is injured. These spots being on the employer's premises admittedly he could recover.

Why should he fail because though one is on the employer's premises the other is not but is a place to which he has access only from his employer's premises and only because he is there employed? Certainly I think there is no case which so decides.

By arrangement with the railway company a platform confined to the employers' workmen and only reached through their premises is a recognized means of egress. Until they have passed through it to a place not confined to them they are still in the course of their employment even though there was an alternative path which they might have used. That the machinery adopted was for the employer to supply them with tickets and that therefore they could insist on travelling by train is, I think, immaterial.

Often enough, no doubt, in considering the facts of an individual case it is of assistance to recall that the place off the premises is the only means of entrance or exit, and thus it comes about that in expressing their views upon those facts the Court of Appeal and indeed members of your Lordships' House have laid emphasis upon that fact. *Hewitson's* case (1) and *Newton's* case (2) are instances in which such expressions of opinion were used. But the decisions in those cases did not turn upon the fact that there was more than one entrance or exit, but upon whether the man at the moment of the accident was in the course of his employment. In the particular circumstances a convenient test was whether the man owed any duty to his employer to be there, and in determining whether there was any duty or not, the fact that there were alternative ways to the workman's home after he had left the area of his employment was no doubt an important element for consideration.

Even, however, if duty be taken as the test to apply where the area of the employment is reached, it may be as much the workman's duty to enter or depart by one alternative way as by another. He is in the course of his employment, not because he chooses that situated on the premises rather than that off, but because either is a method of entering or leaving the area of his work ; a method which is confined to him and to his fellow workers.

The only expression of opinion to the contrary which I can find in either case is the disapproval expressed by Lord Wrenbury in *Hewitson's* case (1) of *Cremins* v. *Guest, Keen and Nettlefolds, Ld.* (3), but more particularly of *Walton* v. *Tredegar Iron Co., Ld.* (4) But that expression is his alone, is not a necessary basis for his view, much less is it a necessary basis for the views of the other noble and learned Lords who adjudicated upon that case. It is therefore not binding on your Lordships' House.

Speaking for myself, I think *Walton's* case (4) was rightly decided. As to *Cremins*' case (3), I do not think it is necessary to express any opinion as I do not think it analogous to this.

If support for the opinion I have expressed be required, I

(1) [1924] A. C. 59.
(2) 19 B. W. C. C. 119.
(3) [1908] 1 K. B. 469.
(4) (1913) 6 B. W. C. C. 592.

think it can be found in the dissenting judgment of Romer L.J. in *Holness* v. *Mackay & Davis* (1), a judgment which was expressly approved by Lord Finlay L.C. in *Stewart & Son* (1912), *Ld.* v. *Longhurst.* (2) If the facts of the former case be examined it will be found that there were two methods of approach to the man's work, both of which required him to cross a railway line not under the control of the appellants but at different points and with varying degrees of danger. He chose the more dangerous method and yet was held by Romer L.J. to be entitled to recover.

The same principle is, I think, to be derived from the words of my noble and learned friend Lord Atkin, then Atkin L.J., in *Howells* v. *Powell Duffryn Steam Coal Co., Ld.* (3), and indeed from all the judgments in that case. An even more direct authority is to be found in *Foster* v. *Penfold & Co., Ld.* (4), in which a workman left his car on a wharf backing on to but not part of his employers' premises. In the course of driving away at night he fell into a dock and was drowned. He could have left his car elsewhere than on the wharf but he was permitted as a privilege of his employment to leave it there. In those circumstances the Court of Appeal held that his dependants were entitled to recover because he was bound to leave his employers' premises in some way and was entitled though not bound to leave them in the method adopted.

"He was leaving them by a permissible way and in a "permissible manner, and the accident occurred before he "had finally got free from those premises and was in a public "place, that is to say, on a public highway": per Romer L.J. (5)

Finally, the conclusion at which I have arrived is, in my view, consistent with the line of reasoning adopted in the speech of Lord Macmillan in *Northumbrian Shipping Co., Ld.* v. *McCullum* (6), a speech in which the other noble and learned Lords concurred, and comes directly within the words

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(1) [1899] 2 Q. B. 319, 327.
(2) [1917] A. C. 249, 254.
(3) [1926] 1 K. B. 472, 485.
(4) 27 B. W. C. C. 240.
(5) Ibid. 259.
(6) 48 Times L. R. 568, 572.

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to be found on p. 572: "It has been recognised time and "again that the sphere of a workman's employment is not "necessarily limited to the actual place where he does his "work. If in going to or coming from his work he has to use "an access which is part of his employer's premises or which "he is only entitled to traverse because he is going to or "coming from his work, he is held to be on his master's "business while he is using that access."

Nor can I see anything in the speech itself or in the collocation of the words to suggest that they are confined to a case where there is only one means of access whether on or off the premises.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for T. S. Edwards & Sons, Newport, Monmouthshire.*

Solicitors for respondents: *Furniss, Wells & Co., for Arthur J. Prosser, Cardiff.*

[HOUSE OF LORDS.]

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Apr. 11, 15, 16; *June* 24.

SMITH, HOGG AND COMPANY, LIMITED. APPELLANTS;

AND

BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY, LIMITED . . RESPONDENTS.

Shipping—Charterparty—Seaworthiness—Timber cargo—Instability of vessel—Loss of part of cargo.

A shipowner is responsible for loss or damage to goods, however caused, if his ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness.

Per Lord Wright: It is immaterial that other causes from whose effect the shipowner is excused have contributed to occasion the loss. In this connection no distinction can be drawn between cases where the conduct of the master, whether negligent or not, is a cause, and cases in which any other cause, such as perils of the sea or fire, is a contributory cause.

Per Lord Porter: A ship which has a large negative metacentric height and is therefore so unstable that the placing of a comparatively small additional weight either to port or starboard causes her to list suddenly and violently from one side to the other is not in a seaworthy state.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The appellants, the owners of the steamship *Lilburn*, claimed 3325*l.* 2*s.* 1*d.* as a general average contribution; the respondents counterclaimed 1740*l.* 10*s.* 5*d.* in respect of short delivery and damage to cargo.

The *Lilburn* loaded at Soroka 703,111 St. Petersburg standards of timber, of which 255,232 were on deck. The master shut out about 900 standards because instability had already manifested itself by the vessel listing five degrees to port during the loading of the last few slings of cargo, and she in fact sailed with a list, and as she proceeded the port list increased to eight or nine degrees, and after that happened she went over to starboard with a list of seven degrees which increased to twelve, then to fifteen, which was her condition when she put in to Stornoway to replenish her bunkers. In order to do so she was moored with her port side alongside a coal hulk, no deck cargo being removed before the bunkering. When about sixteen tons had been put into her bunkers she started to come upright, and then she went over to port and when the port list had reached about twenty-five degrees water poured into her and eventually she lay on her beam ends. She was put on the beach, the deck cargo was discharged, portions were lost or damaged, but the balance was reshipped and the vessel was towed to Garston with the rest of her cargo.

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* *Present:* VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

Branson J. held that the *Lilburn* was unseaworthy and the warranty broken, but that the unseaworthiness did not cause the loss, and he held that the accident occurred not by reason of the unseaworthiness of the *Lilburn* but by reason of the acts of the master and that the owners were entitled to succeed by reason of the exception "act neglect or default" with charterparty.

On appeal the Court of Appeal reversed the decision of Branson J., holding that the cause of the disaster was the unstable condition of the *Lilburn* on sailing from Soroka.

The shipowners appealed to this House.

Sir Robert Aske K.C. and *Cyril Miller* for the appellants. The loss was not due to unseaworthiness, but to the manner in which the bunkering was carried out, and that was due to the act or neglect of the master who ought to have seen that the bunkering was carried out efficiently, particularly in view of the list which had already taken place.

G. St. C. Pilcher K.C. and *Valentine Holmes* (for the *Hon. T. G. Roche,* absent on war service) were not called upon.

The House took time for consideration.

1940. June 24. Viscount Maugham. My Lords, I had prepared an opinion on this appeal before I had the advantage of reading the opinions of my noble and learned friends Lord Wright and Lord Porter. I find in those opinions all the remarks which I had proposed to address to your Lordships, and in order to save your Lordships' time I merely say that I agree with those opinions and with the necessary conclusion that this appeal must be dismissed with costs.

LORD WRIGHT. My Lords, my noble and learned friend Lord Atkin requests me to say that he has read in print the opinion which I am about to deliver and agrees with it.

LORD WRIGHT. My Lords, the appellants, who are owners of the steamship *Lilburn*, claimed in the action a general average contribution from the respondents who, for purposes of the case are treated as standing in the shoes of the charterers, Exportles Moscow, under a charterparty dated July 24, 1935. The respondents resisted the claim on the ground that the *Lilburn* was unseaworthy on sailing from the loading port Soroka and that the appellants had not exercised due diligence to make her seaworthy, and that the average act was occasioned by the unseaworthiness, as also was the loss of and damage to cargo for which they counterclaimed. Branson J. who tried the case in the Commercial Court decided in favour of the appellants, but his decision was reversed by the Court of Appeal.

Both Courts decided that the steamship was unseaworthy on sailing and that the appellants had not exercised due diligence to make her seaworthy. But whereas Branson J. held that the unseaworthiness did not cause the loss, the Court of Appeal held that the cause of the disaster was the unstable and unseaworthy condition of the vessel, which was due to a failure to exercise due diligence.

There are thus concurrent findings on the fact of the unseaworthiness. This House is not debarred from re-opening, and, if so advised, reversing, concurrent findings of facts of the Courts below, though the House will always treat such findings with respect. In the present case I have, after carefully considering the evidence, come to the conclusion that there is no ground for differing from the findings of the Courts below. I shall state very shortly why I agree with these findings. The charterparty provided for the loading at

Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the vessel could reasonably stow and carry, to be delivered at Garston. Of the other conditions contained in the charterparty it is only necessary to refer to certain exceptions set out in clause 12, in particular that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage arising from (amongst other things) act, neglect or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. General average, if any, was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English Law.

The *Lilburn* loaded at Soroka 703,111 St. Petersburg standards of timber, of which 255,232 were on deck. The master shut out about nine standards, because, as the judge found, instability had already manifested itself by the vessel listing about five degrees to port during the loading of the last few slings of cargo. The *Lilburn* sailed with that list. On sailing she had no appreciable metacentric height; indeed she had it seems a small negative metacentric height. The weather on the voyage was not exceptional, the highest force of wind being force seven on two days. But as the voyage went on the port list increased to eight or nine degrees, and two days after that happened she went over to starboard with a list of seven degrees, which increased to twelve degrees, then to fifteen and then to seventeen degrees, which was her condition when she put into Stornoway to replenish her bunkers, of which she had then only four tons left. She had started from Soroka with insufficient bunkers and was in that respect unseaworthy but no point has been made of this, and I ignore it. On entering Stornoway to coal, the forepeak was pumped out, as she was considerably down by the head. That obviously would increase her tenderness. In order to bunker she was moored with her port side alongside a coal hulk. No deck cargo was removed before bunkering. When

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about sixteen tons had been put into her bunkers, which was done as nearly as possible in the midship section of the ship, she started to come upright. She then went over to port and when the port list had reached about twenty-five degrees water poured into her and eventually she lay on her beam ends. Her crew had to leave her. She was put on the beach with the help of tugs, the deck cargo was discharged, portions were lost or damaged, but the balance was reshipped, and she was towed to Garston with the rest of her cargo, some of it being in a damaged condition.

There was some conflict of expert evidence, but it seems clear that the deck cargo rendered the vessel unstable and too tender for the voyage. It is true that she could not sink because the timber would keep her afloat, but she was liable to fall, as she did in fact, on her beam ends, and become a derelict. She was clearly unfit to carry and deliver the cargo safely and her condition endangered the lives of the crew. She was unseaworthy on any definition of the term. It was sought to say that the disaster at Stornoway was due to the act of the master in putting in the bunkers as he did, and in pumping out the forepeak. It was said that his action in these respects was negligent, and, also, it may be, that he began to bunker her without discharging or reducing the deck cargo. There is no clear finding that the master was negligent. But whether he was negligent or not, what the master did could have done no harm if the *Lilburn* had not been unseaworthy. The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The overloading was the result of overt acts.

On these facts Branson J. decided in favour of the appellants. Though he held that the vessel was unseaworthy and the warranty had been broken, the unseaworthiness did not in his opinion cause the loss. He held that the necessary nexus between the unseaworthiness and the disaster was absent because in his opinion the vessel could have been bunkered at Stornoway in such a manner as to bring her back to upright and enable her to proceed and deliver her cargo at Garston. He distinguished *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (1), on the ground that there the defect could not have been remedied during the voyage. He held that the accident took place not by reason of the unseaworthiness of the ship but by reason of the acts of the master which were wrong in the circumstances and that the appellants were entitled to succeed by reason of the exception in clause 12, "act neglect or default of the master." He did not in terms find that the master was negligent; though perhaps that is implied. Earlier in his judgment, however, he had described the putting on board of the 16 tons as done "in a very ordinary way."

This decision obviously raised a very important question of mercantile law. It was reversed by the Court of Appeal. MacKinnon L.J. in giving the leading judgment, agreed with the finding of Branson J. on the issue of unseaworthiness. He held that the cause of the disaster was clearly due to the unstable condition of the vessel on sailing from Soroka, which had continued right up to the disaster, and all that could be said about the master's conduct at Stornoway was that his act, or default, conduced to the disaster either by his not doing something, or by his doing something which might have been done differently, to prevent the disaster, either in pumping out the forepeak or putting in the bunkers as he did. In his opinion the test to apply—following *Kopitoff* v. *Wilson* (2) was "although the disaster at Stornoway would not have "happened but for the fact that coals were being loaded with "the forepeak pumped out, yet it is to be considered as caused "by the unfitness if the jury (or judge) think the vessel would "not have capsized if she had sailed in a fit state from Soroka." He held accordingly that the appellants could not recover in respect of the general average loss and expense, but were liable on the counterclaim. du Parcq L.J. concurred. But he doubted what the proper answer would have been if, there having been a clearly negligent act on the part of the master, coupled with unseaworthiness, the question was whether the loss was caused by the former or the latter, or by both. But he thought that the conduct of the master was perfectly excusable. Macnaghten J. gave no separate judgment. I agree with MacKinnon L.J.'s statement of the law but in view of the considered opinion of Branson J., I feel it desirable to state in my own way how I regard this question of law, which is fundamental in regard to the sea carriage of goods. I do not, with respect, share du Parcq L.J.'s doubts, which I think are really inconsistent with the reasoning of MacKinnon L.J.

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(1) [1934] A. C. 538.

(2) (1876) 1 Q. B. D. 377.

Sir Robert Aske has strenuously contended on behalf of the appellants, that the master's action, whether or not negligent, was "novus actus interveniens," which broke the nexus or chain of causation, and reduced the unseaworthiness from "causa causans" to "causa sine quâ non." I cannot help deprecating the use of Latin or so-called Latin phrases in this way. They only distract the mind from the true problem which is to apply the principles of English law to the realities of the case. "Causa causans" is supposed to mean a cause which causes, while "causa sine quâ non" means, I suppose, a cause which does not, in the sense material to the particular case, cause, but is merely an incident which precedes in the history or narrative of events, but as a cause is not in at the death, and hence is irrelevant. English law can furnish in its own language expressions which will more fitly state the problem in any case of this type. Indeed the question what antecedent or subsequent event is a relevant or decisive cause varies with the particular case. If tort, which may in some respects have its own rules, is put aside and the enquiry is limited to contract, the selection of the relevant cause or causes will generally vary with the nature of the contract. I say "cause or causes" because as Lord Shaw pointed out in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Co.* (1), causes may be regarded not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case. That this is the test of the significance of an event from the standpoint of causation is clearly illustrated by this very doctrine of seaworthiness and its relation to kindred questions of negligence as applied to the two maritime contracts, marine insurance and sea carriage of goods. In the former, unseaworthiness is a condition precedent (at least in voyage policies) and if not complied with the insurance never attaches. In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss, as was held in *The Europa* (1) and in *Kish* v. *Taylor.* (2) Again, in marine insurance, negligence causing the loss does not in general affect the insured's right to recover. In carriage of goods by sea, the shipowner will in the absence of valid and sufficient exceptions be liable for a loss occasioned by negligence. Apart from express exceptions, the carrier's contract is to deliver the goods safely. But when the practice of having express exceptions limiting that obligation became common, it was laid down that there were fundamental obligations, which were not affected by the specific exceptions, unless that was made clear by express words. Thus an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence: see *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (3) From the nature of the contract, the relevant cause of the loss is held to be the unseaworthiness or the negligence as the case may be, not the peril of the sea, where both the breach of the fundamental obligation and the objective peril are co-operating causes. The contractual exception of perils of the seas does not affect the fundamental obligation, unless the contract qualifies the latter in express terms.

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(1) [1918] A. C. 350, 369.

To consider these rules, in relation to unseaworthiness, I think the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause. The law is, I think, correctly stated by the late Judge Carver in Carriage of Goods by Sea, s. 17. I quote from the fourth edition, published in 1905, which was the last edition revised by the learned author. The words of the section are: "And "further the shipowner remains responsible for loss or damage "to the goods, however caused, if the ship was not in a "seaworthy condition when she commenced her voyage and "if the loss could not have arisen but for that unseaworthiness ". . . . If her unfitness becomes a real cause of loss or "damage to the cargo, the shipowner is responsible, although "other causes from whose effect he is excused either at "common law or express contract have contributed to cause "the loss." The author relied for that proposition not only on *Kopitoff* v. *Wilson* (1), cited by MacKinnon L.J., but on *The Glenfruin* (2), *Steel* v. *State Line Steamship Co.* (3) In truth, unseaworthiness, which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss. At least I have not thought of a case where it can be the sole cause. It must, I think, always be only one of several co-operating causes. The importance to my mind of Carver's statement is that it uses the indefinite article, "'a' cause," not the definite article, "'the' cause." In this connection I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire, is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case, it is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action. There is precise authority for this in the judgment of the Court of Appeal delivered by that great authority on mercantile law, Scrutton L.J., with the concurrence of Bankes and

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(1) [1908] P. 84.
(2) [1912] A. C. 604.
(3) [1934] A. C. 538.

(1) (1876) 1 Q. B. D. 377.
(2) (1885) 10 P. D. 103.
(3) (1877) 3 App. Cas. 72.

Atkin L.JJ. in *The Christel Vinnen.* (1) Cargo in that case was damaged by leakage through a leaky rivet; the damage might have been checked but for the negligence of the master in not detecting the water in the hold and pumping it out. It was held (notwithstanding an exception of negligence) that the shipowners were responsible for the whole of the damage, not merely for such proportion as must have been incurred before the inflow of water could have been checked. No distinction was drawn between damage due to perils of the seas alone and that due to perils of the seas and to negligence combined. Scrutton L.J. said (2): "The water which entered "and did the damage entered through unseaworthiness; its "effects when in the ship might have been partially remedied "by due diligence, which the shipowner's servant did not take. "But in my view the cause of the resulting damage is still "unseaworthiness . . . . Here the man who has by his original "breach of contract caused the opportunity for damage has "by the negligence of his servants increased it. He cannot "show any exception to protect him, and cannot show that "the dominant cause of the damage was not the unsea-"worthiness which admitted the water into the ship." I think this can be as truly said of negligence in acting as in omitting to act. If I may however venture to criticise the language of the learned Lord Justice, I should prefer to avoid the word "dominant" which he takes from the marine insurance cases cited by him, in which it is necessary to find the causa proxima or dominant cause. This results by reason of the special character of that contract where the liability to pay depends, broadly speaking, on the casualty being caused directly by the happening which the contract stipulates to be the event on which the indemnity becomes exigible. There may be in marine insurance cases a competition of causes so that it is necessary to determine which event is the dominant cause. Negligence is not material, nor, in time policies, is unseaworthiness material, nor is it material, in one sense, in other classes of marine policies from the point of view of causation, since if the warranty is not complied with, the risk

(1) [1924] P. 208.

(2) Ibid. 208, 214.

never attaches. In cases, however, of the sea carriage of goods the liability depends, in the words of the Lord Justice, on a "breach of contract," that is, to provide a seaworthy ship. The sole question, apart from express exception, must then be: "Was that breach of contract 'a' cause of the damage." It may be preferred to describe it as an effective or real or actual cause though the adjectives in my opinion in fact add nothing. If the question is answered in the affirmative the shipowner is liable though there were other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not or a combination of both kinds of cause. I think this was also the view of Lord Atkinson in the curious case of *Standard Oil Company of New York* v. *Clan Line Steamers* (1), where the vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because the master, being uninstructed, made a manœuvre which caused her to capsize. He would not have done so if he had been instructed as he ought to have been. But Lord Atkinson said (2): "There is nothing to show that what actually "occurred would not appear to a competent seaman, properly "instructed, to be the thing which would most probably occur "under the circumstances. The evidence, I think, establishes "that the master's handling of his ship amounted to gross "and flagrant mismanagement for which there was no excuse." Lord Atkinson went on to hold that all the same the shipowners were responsible. The loss resulted from the unseaworthiness. In that as in other cases, including the present case, the right to rely on the exception of negligence was conditional on due diligence on the part of the owners to make the ship seaworthy, which the owners had failed to exercise. I refer to this authority in support of the conclusion that "a" cause of the loss was the unseaworthiness, notwithstanding the intervening negligence of the master. In cases of the type now being considered, the negligence, if any, must almost inevitably

(1) [1924] A. C. 100.

(2) Ibid. 120.

occur in the course of the voyage, and thus intervene between the commencement of the voyage when the duty to provide a seaworthy ship is broken, and the actual disaster. I doubt whether there could be any event which could supersede or override the effectiveness of the unseaworthiness if it was "a" cause.

This is clearly so in the facts of this case. The acts of the master in bunkering as he did, and in pumping out the forepeak, whether negligent or not, were indeed more proximate in time to the disaster, and may be said to have contributed to the disaster, but the disaster would not have arisen but for the unseaworthiness, and hence the shipowners are liable.

In my opinion the judgment of the Court of Appeal was correct and should be affirmed. The appeal should be dismissed with costs.

LORD PORTER. My Lords, I am authorized by my noble and learned friend Lord Romer to say that he concurs in the opinion which I am about to deliver.

LORD PORTER. My Lords, the appellants were at all material dates owners of the steamship *Lilburn*. On July 24, 1935, they entered into a charterparty with Exportles of Moscow as charterers for the loading at Soroka in the White Sea of a timber cargo, to be loaded both under and on deck for carriage to Garston.

On the course of her voyage the ship and cargo incurred a loss in respect of which a claim was made upon the underwriters. The respondent underwriters thereupon entered into an average guarantee on December 24, 1935, for payment of any contribution to general average and/or salvage and/or special charges on cargo which might be ascertained properly to be due in respect of the cargo. On that guarantee the appellants sued the respondents claiming a sum of 3325*l*. 2*s*. 1*d*., and in that action, by arrangement between the parties, the respondents were admitted to counterclaim for loss of and damage to cargo said to amount to 1740*l*. 10*s*. 5*d*. In so counterclaiming the respondents were treated as standing in the position of the holders of the bills of lading. No question as to the amount recoverable is raised in the present appeal.

The charterparty provided for the loading at Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the ship could reasonably stow and carry. The exceptions clause (clause 12) provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness unless the cause should be want of due diligence on the part of the shipowner to make his ship seaworthy, and (inter alia) that the shipowner should not be responsible for loss or damage arising from the act, neglect, or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. Under clause 13 the vessel had liberty to call at any ports in any order for fuel, and by clause 22 it was provided that general average if any should be settled in London according to York-Antwerp Rules, 1924, in accordance with English law.

The *Lilburn* loaded a cargo of 703,111 St. Petersburg standards of wood goods, of which 255,232 were carried on deck. The loading was completed and the ship sailed on September 5, but on the previous day the master shut out some six to nine standards; his reason for so doing was found by the learned judge who tried the case to be due to the fact that the vessel was unstable and had by that time listed about five degrees to port. On sailing the *Lilburn* had 154 tons of bunker coal on board, and according to the finding of the learned judge even at that time she had either no metacentric height or even a small negative metacentric height. The weather which she encountered on her voyage was not abnormal, it was, as the chief officer said, the type of weather you would expect on that voyage at that time of year.

Owing, however, to her original instability and the consumption of bunkers her list increased to eight or nine degrees to port until September 10 when some of the deck cargo was re-stowed under deck in an endeavour to counteract the instability. Nevertheless, on September 12 she heeled over from port to starboard taking a list of seven degrees. By the

14th this list had increased to twelve degrees when the fore peak was pumped up to fifteen feet in order to improve the situation and counteract the effect of the consumption of coal from the cross bunkers. In spite of these precautions the list increased to fifteen and ultimately to seventeen degrees.

As she had not enough coal on board to carry her to Garston she put into Stornoway intending to take on board an additional fifty tons of bunkers. At that time she had only some four tons left. On entering the harbour the fore peak tank was pumped out in order to improve her steering which had become difficult by reason of the fact that she was down by the head. She was then moored alongside a coal hulk, and in an attempt to counteract the list, the coal which was being taken on board was directed, though perhaps not with complete success, to the port side. Whilst the coal was being taken on board, the ship gradually decreased her list to about nine degrees, until about sixteen tons had been shipped. She then suddenly took a heavy list to port until she reached some twenty-five degrees with the result that water came into the engine and bunker space, and caused her to go on to her beam ends. In this condition she lay with her masts broken or carried away, and her crew had to leave her. Thereafter she was beached and her deck cargo discharged. Finally she was towed to Garston with the rest of her cargo on board but partially damaged. The expenses so incurred were the subject of the general average claim and the damage to the cargo the subject of the counterclaim.

To test the question of liability an action was brought in the High Court of Justice and transferred to the Commercial List, where it was tried before Branson J. It was admitted that if the loss was caused for any reason for which the shipowners were responsible the appellants were not entitled to recover any sum for general average, and were liable for the damage done. The respondents contended that when the *Lilburn* left Soroka she was unseaworthy and that that unseaworthiness was due to want of due diligence on the part of the appellants. In reply the appellants denied that the ship was unseaworthy and alleged that the loss was not caused by unseaworthiness but either by perils of the seas or else by the negligence of the appellants' servants. No point appears to have been taken in the Courts below nor was it contended in your Lordships' House that if the ship was unseaworthy that unseaworthiness was not caused by want of due diligence on the part of the appellants. It was accepted that the diligence required was that of the owner, his servants or agents. But it was strenuously contended that the vessel was not in fact unseaworthy. It was said that in a timber ship the absence of metacentric height or even the existence of negative metacentric height did not make the vessel unseaworthy, that owing to the presence of the deck cargo she would take a list appropriate to make that height either positive or at least not negative, and that the fact that her instability might make her list from side to side was a matter of no consequence.

No Court has accepted this view, and it appears to be common ground that in the condition in which she sailed and with the necessary consumption of bunkers her negative metacentric height must gradually increase and in fact did increase until it had reached four inches. Whatever may be the case where a timber carrying vessel sails with a list due to the fact that the cargo is heavier on one side than the other, I cannot take the view that a ship which has a large metacentric height and is therefore so unstable that the placing of a comparatively small additional weight either to port or starboard causes her to list suddenly and violently from one side to the other, is in a seaworthy state. In the present case the shipment of some sixteen tons of coal at the bottom of the cross bunker, possibly near the centre of the ship and at worst on the port side, was enough to cause so violent a change. Less stability may well be called for in a ship carrying a timber cargo than in vessels engaged in other trades, but I cannot think that so great an absence of metacentric height actual or potential is justified or that the learned judge had not ample evidence to support his finding.

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For these reasons I am clearly of opinion that the ship was unseaworthy and that her unseaworthiness was due to the failure of the owners to take proper steps.

Nor can it be said that in bringing about this disaster the master was at fault. The appellants' own expert witness, Dr. Telfer, said in evidence: "In our profession we find it "rather difficult for the layman to visualise just why because "a ship is listing this way it is not the correct thing to do "to put weights on that side. Any layman can be forgiven "for trying that side first. I am quite sure that even "naval architects who have experience of that particular "problem would answer the wrong way were they caught "unawares."

But the appellants say that they are protected by the exception of perils of the sea and that even though the ship was unseaworthy the unseaworthiness did not cause the loss. To this argument the learned judge acceded, but his view was reversed by the Court of Appeal. The argument was put thus: that the ultimate cause of the loss was the act or acts of the master either in pumping out the tank or in shipping the coal on the port side or both.

No doubt those who are either defending themselves or putting forward a counterclaim based upon an allegation of unseaworthiness must prove that the loss was so caused.

But here the loss was, I think, incontestably due to the inability of the ship to take in bunkers by a method which would have been both safe and usual in the case of a seaworthy ship. It was not the coaling that was at fault nor the method adopted: it was the fact that that coaling took place and that method was adopted in a tender ship. If a vessel is to proceed on her voyage, bunkers must be shipped, and though in one sense the change of balance caused by taking in bunkers was responsible for the accident to the *Lilburn*, it was not the dominant cause even if it be necessary to show what the dominant cause was. The master merely acted in the usual way and indeed exercised what he thought was exceptional care in diverting the coal shipped towards the port bunker. In a seaworthy ship his action would have been

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a safe one. It was the instability of the ship which caused the disaster.

In such circumstances it is unnecessary to decide what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness, or to determine whether the fact that the unseaworthiness was a substantial cause even though some other matter relied upon were a substantial cause also, would be enough to make the owners liable for failure to use due care to make the vessel seaworthy.

I agree with all your Lordships in thinking the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Sinclair, Roche & Temperley, for Temperley, Tilly & Hayward, West Hartlepool.*

Solicitors for respondents: *Ince, Roscoe, Wilson & Glover.*

[HOUSE OF LORDS.]

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AND

June 4, 5, 6; Aug. 1.

DONCASTER AMALGAMATED COLLIERIES, LIMITED . . . . RESPONDENTS.

Master and servant—Contract of service—Company—Reconstruction or amalgamation—Order by Court for transfer of property rights, powers and liabilities of transferor company to transferee company—Whether employee bound by transfer—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 154.

Where an order is made by the Court under s. 154 of the Companies Act, 1929, for the amalgamation of two companies, a contract of service existing at the date of the amalgamation between a workman and the transferor company does not automatically become a contract of service between the workman and the transferee company. So *held*, Lord Romer dissenting.

Decision of Court of Appeal [1939] 2 K. B. 578 reversed.

APPEAL from the decision of the Court of Appeal. (1)

The appellant had been for some time in the employment of the Hickleton Main Company, Ld. On June 4, 1937, an order was made by the Chancery Division under s. 154, sub-s. 1, of the Companies Act, 1929 (2), transferring to the respondent

(1) [1939] 2 K. B. 578.

(2) Companies Act, 1929, s. 154, sub-s. 1: "Where an application "is made to the court . . . . for "the sanctioning of a compromise "or arrangement . . . . and it "is shown to the court that the "compromise or arrangement has "been proposed for the purposes "of or in connection with a scheme "for the reconstruction of any "company or companies or the "amalgamation of any two or "more companies, and that under "the scheme the whole or any part "of the undertaking or the pro"perty of any company concerned "in the scheme (in this section "referred to as 'a transferor "'company') is to be transferred "to another company (in this "section referred to as 'the "'transferee company'), the "court may . . . ." by order ". . . . make provision for all or "any of the following matters:—

"(*a*) the transfer to the trans"feree company of the whole or "any part of the undertaking "and of the property or lia"bilities of any transferor "company. . . . "

Sub-s. 4 provides: "In this "section the expression 'property' "includes property, rights and "powers of every description, and "the expression 'liabilities' in"cludes duties."

* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD ROMER, and LORD PORTER.

company all the property, rights, powers, liabilities and duties of the Hickleton company. On October 7, 1937, the appellant absented himself from work in circumstances which would have made him liable under s. 4 of the Employers and Workmen Act, 1875, if he could be regarded as under a contract of service with the respondent company. This however, he denied, but on a summons preferred against him under the Act of 1875, for unlawfully absenting himself from work, the justices adjudged that he should pay the sum of 15*s.* and 10*s.* costs. From that order he appealed, but the Divisional Court and the Court of Appeal dismissed the appeal. He appealed to this House.

John Morris K.C. and *G. Granville Sharp* for the appellant. The question is whether upon the amalgamation of two companies under s. 154 of the Companies Act, 1929, a contract of personal service entered into by an employee with one of these companies is ipso facto transformed into a contract of personal service between the employee and the transferee company irrespective of the consent of the employee. We submit that a contract of personal service is not assignable, being by its nature unlike other contracts, and is not transferable without the consent of the employee. That consent was not given in the present case. The transfer effected by s. 154 of the Companies Act, 1929, is only of things which by their nature are assignable. There is a fundamental difference between a contract for personal service, such as there is in this case, and other contracts. It has been said on behalf of the respondents that s. 154 of the Companies Act is very wide in its terms and is intended to facilitate transfers, but contracts of personal service cannot be included seeing that they would involve new liabilities on the employee without his consent. In his contract with the Hickleton company there was no doubt implied an agreement by the appellant to obey the lawful orders of that company; there was no such agreement by him to obey the orders of any other company. *Brace* v. *Calder* (1), we submit, shows that

(1) [1895] 2 Q. B. 253.

a contract of personal service may not be assigned without consent; see also *Tolhurst* v. *Associated Portland Cement Manufacturers* (1), where Collins M.R. said (2): "It is, I think, "quite clear that neither at law nor in equity could the burden "of a contract be shifted off the shoulders of a contractor on "to those of another without the consent of the contractee."

[LORD THANKERTON referred to *Cole* v. *Handasyde & Co.* (3)]

Wynn Parry K.C., *Hylton-Foster* and *Denis Robson* for the respondents. We challenge the contention made on behalf of the appellant that s. 154 of the Companies Act, 1929, is procedural only. Its purpose is correctly stated in the marginal note, which reads thus: "Provisions for facilitating "reconstruction and amalgamation of companies," and it follows on, and is complementary to s. 153, being designed to carry out the arrangements made under that section. That is the key to the section—to carry out any compromise or arrangement under s. 153. Every transaction contemplated by the two sections is essentially commercial and intended to give full effect to it. So far from being procedural only, s. 154 is in one aspect quite revolutionary, as making a substantial alteration in company law. Why has this been done? It is to accomplish by one document everything which previously would have necessitated a number of documents with consequent stamp duties on each. Thus the whole previous procedure is short-circuited by s. 154, than which no more apt language could have been devised to achieve the result aimed at. By the amalgamation all rights and liabilities are transferred, the language used being clearly wide enough to deal with everything which the transferor company had, the transferee company taking the place of the former. The highly artificial objection which has been taken to this scheme should be given no weight.

[LORD THANKERTON. I do not think it can be called highly artificial. Take the case of a managing director at a large salary. Can his position be prejudiced?]

It must be borne in mind that before a scheme is brought

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(1) [1902] 2 K. B. 660.
(2) Ibid. 668.
(3) 1910 S. C. 68, 72.

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before the Court great care is taken to see that some arrangement is made whereby no one should be prejudiced. It must always be a matter of degree. Testing the matter from the point of view of liabilities: we find that every liability is transferred. The word "liabilities" is given a meaning more extensive than is to be expressed in terms of money, and is wide enough to include all former obligations. We rely on the words in sub-s. 2, "vest in." The Act has dispensed with one element, namely, the consent of one of the parties. There is thus a substitution and the creation of a new legal relationship. The view submitted on behalf of the appellant would involve a curious result, namely, a transfer of all the liabilities of the transferred company, but only a partial transfer of the rights, or only a partial transfer of property and a partial transfer of liabilities. There would thus be something omitted in carrying out a scheme under s. 154. If the contention on behalf of the appellant is right, so far from facilitating amalgamation s. 154 would be made in effect a dead letter. We say that the whole subject-matter—rights and liabilities—pass from the old company to the new.

John Morris K.C. in reply. In the case of a right which is clearly non-assignable—and that is this case—there are no words in the Act which apply to it. The new contract would create a wholly new relationship. The contract now in question by its very nature does not pass from the one company to the other, and the person entitled to say so is the present appellant who contracted only with the old company.

The House took time for consideration.

1940. Aug. 1. Viscount Simon L.C. My Lords, the question to be decided in this appeal can be thus stated. When the Court makes an order under s. 154 of the Companies Act, 1929, transferring all the property and liabilities of the transferor company to the transferee company, is the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company?

The appellant is a coalminer, and between January, 1937, and June 4, 1937, there existed between him and the Hickleton Main Colliery Company, Ld., a contract under which he worked at the colliery and received wages from that company. On June 4, 1937, an order was made by the Chancery Division of His Majesty's High Court of Justice under s. 154, which transferred to the respondent company all the property, rights, powers, liabilities and duties of a number of colliery companies, including the Hickleton Main Colliery Company, and which provided that these transferor companies should be dissolved without winding up. The appellant continued to work at the Hickleton Main Colliery until October 7, 1937, and received wages from the respondents for his labour, but he throughout believed himself to be working under his contract with the Hickleton Main Colliery Company, Ld., which contract had never been terminated by notice. The company, however, as the result of the order made by the Chancery Division, had ceased to exist. On October 7, 1937, the appellant absented himself from work, in circumstances which would have made him liable under s. 4 of the Employers and Workmen Act, 1875, if he could be regarded as under a contract of service with the respondents. This he denied, and hence, on a case stated by the justices of Doncaster, the general question arises which I have defined above and which the House has now to determine.

Counsel for the appellant argued that a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y. The rule is so strict that if the contract is between individuals on both sides and X dies, the contract of service is immediately dissolved—*Farrow* v. *Wilson* (1)—for A never promised to serve X's personal representative and X could only act as employer when alive. Where a firm consisting of four partners engaged the plaintiff as manager for a term of two years, the retirement of two partners from the firm within that period operated as a wrongful dismissal of the plaintiff: *Brace* v. *Calder* (2). If A's contract is to serve a limited company, X & Co., and X & Co. goes into liquidation, the winding-up order operates as a notice of discharge to the servants of the company: *Chapman's case.* (3)

The rules of law restricting the assignability of contracts are, however, by no means limited to contracts of personal service. In the case of contracts for the sale of goods, for example (unless the contract expressly or by implication covers the purchaser and his assigns), the seller is entitled to rely on the credit of the purchaser and to refuse to recognize any substitute. Similarly, the purchaser is entitled to rely upon the seller and to hold him responsible for due performance. I may add that a possible confusion may arise from the use of the word "assignability" in discussing some of the cases usually cited on this subject. Thus, in *British Waggon Co. and Parkgate Waggon Co.* v. *Lea* (4) the real point of the decision was that the contract which the Parkgate company had made with Lea for the repair of certain wagons did not call for the repairs being necessarily effected by the Parkgate company itself, but could be adequately performed by the Parkgate Company arranging with the British Waggon company that the latter should execute the repairs. Such a result does not depend on assignment of contract at all. It depends on the view that the contract of repair was duly discharged by the Parkgate company by getting the repairs satisfactorily effected by a third party. In other words, the contract bound the Parkgate company to produce a result, not necessarily by its own efforts, but, if it preferred, by vicarious performance through a sub-contractor or otherwise.

(1) (1869) L. R. 4 C. P. 744, 746.
(2) [1895] 2 Q. B. 253.
(3) (1866) L. R. 1 Eq. 346.
(4) (1880) 5 Q. B. D. 149.

A quite different situation, as it seems to me, is illustrated by the well known case of *Tolhurst* v. *Associated Portland Cement Manufacturers* (1) and, with all respect to an observation made by Lord Lindley at the end of his judgment in *Tolhurst's* case (1), I doubt whether the *British Waggon Company's* case (2) was really an authority very much in point. In *Tolhurst's* case (1) the majority of this House took the view that the contract then under discussion was "assignable," because the contract ought to be read and construed as one between the named parties and their respective assigns, although assigns were not in fact mentioned in the document. By so construing the agreement the validity of the transfer of the benefit of the contract from the original company to the new company to which it assigned it became unchallengeable, and Lord Macnaghten insists, at the beginning of his judgment, that once the true interpretation of the contract was settled there was no further legal point in the case at all. *Tolhurst's* case (1), therefore, was a case in which the terms of the contract provided for its assignment; the *British Waggon Company's* case (2) does not turn on assignment, but illustrates the circumstances in which the original contracting party may perform the contract by getting somebody else to do the work in satisfactory fashion.

It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law—the principle, namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent. The whole question, however, is whether s. 154 of the Companies Act, 1929, provides a statutory exception to that principle.

In favour of the view that it does, it is pointed out that the only transfers which the section can authorize are transfers of the undertaking of one company to another, and that if the employer is a company, the servant can have no direct contact with the artificial entity but of necessity deals with and acts under the orders of the company's agents. Moreover, the change involved in a wage earner serving the new company in place of the old is, in normal cases, no greater than the change he would experience when the company which he is serving throughout changes its directors, its shareholders, its managers, its scope of operations, and its name, all of which it may do without losing its identity. No doubt this is true in many cases, though I am far from saying that the transformation of a small private or family company, in which the wage-earner maintains a personal relation with the principal shareholders who act as managers and directors, into a much larger concern where personal contacts disappear, is in all cases a matter of indifference to the employees. But the point made is that such a transformation can take place without necessarily changing the identity of the company.

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(1) [1903] A. C. 414.

(2) 5 Q. B. D. 149.

It is further argued on behalf of the respondents that s. 154 constitutes a new and simpler machinery for the transfer of the undertaking of an old company to a new company, which thus acquires the undertaking without the necessity of the transferor company going into liquidation. As the Master of the Rolls observed in his judgment, the word "transfer" is not a word of art and the language of s. 154 is in very wide terms. Moreover, s. 154 contemplates, or at any rate provides for, the dissolution of the transferor company when the transfer of its undertaking has been made, and there appears to be no means of calling back to life the company so dissolved, for s. 294 occurs in Part V. of the Companies Act dealing with winding up, whereas s. 154 is found in Part IV.

In these circumstances, and with powerful arguments presented on either side, the House is left with the difficult task of putting the proper construction on s. 154, so far as its application to current contracts of service is concerned. I give full weight to the unanimity of view expressed in the Courts below by judges some of whom speak with special authority on this sort of subject-matter, but after much reflection, and after weighing the reasoning in those judgments and the arguments presented at the Bar of this House, I have to come to the conclusion that contracts of personal service are not automatically transferred by an order made under s. 154.

The principles of construction which apply in interpreting such a section are well established; the difficulty is to adapt well established principles to a particular case of difficulty. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Here, the wider interpretation of s. 154 which has found favour in the Courts below practically amounts to saying, in reference to current contracts of the transferor company, that an order made under s. 154 strikes out the name of the transferor company and substitutes that of the transferee company as a party to the contract. Consequently, all current contracts of service are transformed, without consulting the servant, by substituting the new employer for the old. But it is fallacious to suppose that this wide construction of s. 154 would remove all difficulty in transferring contracts for personal service. If, for example, one of the companies to be amalgamated under the procedure of that section has a long-term contract with an individual to be sole manager of its undertaking, what would happen when the transfer takes place to a new and enlarged company? The remuneration may be quite inadequate, or the individual may be quite unsuited, for so extended a responsibility. Again, if each of half a dozen amalgamating companies has such a contract with its manager, the suggested interpretation of s. 154 appears to lead to absurdity. The truth is that many contracts are not capable of being dealt with by the method said to be involved in the language of s. 154. For example, what would become of a contract which remunerates a manager with a share of the profits of a constituent undertaking, or a contract with a medical man to attend the servants of a company at a fixed total fee? Such contracts cannot be dealt with by simply substituting a new employer for the old, for the nature of the contract necessarily depends upon the old employer continuing to be a contracting party, and any change of employer gives the contract an entirely new meaning.

It seems to me therefore than any difficulties arising in connection with such contracts as I have described above must be disposed of at the time of transfer by negotiation leading either to a new engagement or to compensation. If this is so, it is no longer possible to give an interpretation to s. 154 which would automatically transfer every kind of current contract by merely substituting the name of the new company for the name of the old. The argument that an order made under the section transfers wage-earners from one employer to another without their consent thus loses much of its force. I do not see why there should be any great practical difficulty in the old company announcing to its work-people that the undertaking is about to be transferred to a new company, giving the necessary notice to terminate existing engagements and informing the wage-earners that the new company is prepared to re-engage them on the same terms, and that continuing service after such a date will be taken as acceptance of the new offer. At any rate, after examining s. 154 with close attention and considering the consequences of its application in different cases, I can come to no other conclusion than

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that an order made under it does not automatically transfer contracts of personal service. The word "contract" does not appear in the section at all, and I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest; it cannot be bought or sold; it forms no part of the assets of the employer for the purpose of administering his estate. In short, s. 154 when it provides for "transfer" is providing in my opinion for the transfer of those rights which are not incapable of transfer and is not contemplating the transfer of rights which are in their nature incapable of being transferred. I must make it plain that my judgment is limited to contracts of personal service with which the present appeal is concerned. It may well be that current contracts for the supply and purchase of goods are subject to what I may call a statutory novation, except contracts for the supply of "your requirements" or the like which, like contracts to obey "your orders," do not seem to me capable of automatic transfer.

The conclusion at which I have arrived may be regarded as limiting the usefulness of the section, but to that consideration there are two answers. In the first place I am not justified on that account in giving to the section a wider effect than its true interpretation should provide, and there must be great advantages in avoiding the necessity of liquidation and in effecting transfers without any further act or deed in cases contemplated by the section. In the second place, if the Legislature really desires that workmen should be transferred to a new employer without their consent being obtained, plainer words can be devised to express this intention. I cannot regard s. 154 as plainly authorizing this result and, in my view, the appeal should be allowed with costs here and below, and the question of law raised in the case stated should be answered by saying that a contract of service did not exist between the appellant and the respondents and that the magistrates should dismiss the summons with such order as to costs as they think fit.

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LORD ATKIN (read by LORD WRIGHT). My Lords, this is an appeal from an order of the Court of Appeal dismissing an appeal from a Divisional Court, which dismissed an appeal from an order of the justices at the petty sessions held at Doncaster in and for the Division of Lower Strafforth and Tickhill. The case came before the justices on a summons preferred by the Doncaster Amalgamated Collieries, Ld., against the appellant under s. 4 of the Employers and Workmen Act, 1875. The summons, which was dated October 16, 1937, claimed fifteen shillings for damages for breach of contract alleging that the defendant wrongfully absented himself from or neglected the service of the plaintiffs at their Hickleton colliery on October 7, 1937. The justices adjudged that the defendant pay the sum of 15*s.* damages and 10*s.* costs. The Act gives the justices jurisdiction in disputes between an employer and a workman when the claim does not exceed 10*l.*: and by s. 10, "'workman' . . . . . means any person "who being a . . . . miner . . . . has entered into or works under "a contract with an employer whether the contract . . . . "be express or implied, oral or in writing, and be a contract "of service or a contract personally to execute any work or "labour." The defence of Mr. Nokes was that he had no contract with the respondents: he had been an employee of the Hickleton Main Colliery Company, Ld., and on October 7 he had never heard of the Doncaster Amalgamated Collieries, Ld. To which the answer was that that might be, but by an order made in the Chancery Division on June 4, 1937, under s. 154 of the Companies Act, 1929, all the property rights and liabilities of the Hickleton Main Company had been transferred to the respondent company, and included in them was the contract of service with Nokes, so that from that date he had become without his knowledge the servant of the respondent company. I do not refer to the facts found by the justices in the case stated: but it is clear from the case that Nokes had on October 7 no knowledge of any proposed change in his employers: and that the question of law for determination is whether the order of Crossman J. on June 4 had the effect ipso facto of creating a contract of service between Nokes and the respondent company.

My Lords, I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf. But if Parliament has so enacted the result must be accepted. I venture to think, however, that the effect of the legislation is far different from what it is supposed to be by the six judges who have dealt with the matter in the courts below. The problem arises under two sections in the Companies Act, 1929, ss. 153 and 154, which with section 155 form a small division of the Act entitled "Arrangements and Reconstructions" which, modifying and replacing ss. 45 and 120 of the Act of 1908 provide for compromises between a company and its members or creditors, and also provide for arrangements in the nature of reconstruction or amalgamation. Sect. 154 was introduced for the first time into the Companies Act, 1928, by s. 54, and so found its way into the consolidating Act of 1929. The sections come into play in the following way. The Hickleton Main Colliery Company, Ld., was a company working its pits in Yorkshire. Nokes in January, 1937, entered into a written contract of service with the company to serve it as a miner on the terms and conditions appearing in the bylaws in force at the company's collieries, and the company by this agreement agreed to engage Nokes on the same terms and conditions. The contract was in writing constituted by Nokes's signature to the contract book. At some time before June, 1937, the company together with six other colliery companies proposed an arrangement for amalgamating all the companies with a new company to be formed or then formed, namely, the Doncaster Amalgamated Collieries, Ld.: and as part of the scheme agreed with each other and with the said company to transfer their property rights and liabilities to the new company. I have to rely upon my recollection of the agreement which was produced at the hearing by counsel for the respondents: but I think that the new company were parties to the formal agreement. Application was made to the Court under s. 153 for the approval of this scheme, and the scheme was duly sanctioned by Crossman J. on March 22, 1937. By an order dated June 4, 1937, made by Crossman J. on an originating summons dated April 23, 1937, issued by the Doncaster Amalgamated Collieries, Ld., it was ordered that all the property rights and powers of four of the amalgamating companies including Hickleton Main Company, Ld., as specified in the schedule and all other the property rights and powers of the transferor companies, be transferred without further act or deed, to the transferee company and that the same should vest in the transferee company for all the estate and interest of the transferor companies therein. It was further ordered that all the liabilities and duties of the transferor companies should be transferred to the transferee company without further act or deed, and accordingly the same should, pursuant to s. 154, sub-s. 2, of the Companies Act, 1929, be transferred to and become the liabilities and duties of the transferee company. It was further ordered "that all proceedings now pending by or against the transferor companies "be continued by or against the transferee company", and that the transferor companies should deliver an office copy of the order to the Registrar of Companies and that on such delivery the transferor companies should be dissolved. This order follows very closely the terms of s. 154. The contention is that the effect of the section is to transfer all rights which a transferor company had against anyone at the date of the order whether on personal contracts or on contracts expressed to be non-assignable, or on property the rights in which ceased on assignment.

In other words rights not transferable in law or equity were in fact transferred if necessary against the will of the parties against whom the rights existed, and in confiscation of the rights which those parties had reserved to have dealings only

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with the person, i.e., the transferor company, with whom they had elected to be associated. It means that contracts of service are compulsorily altered ; and new contracts of service with a new employer created without the consent of one of the contracting parties. It is not, of course, confined to weekly or fortnightly contracts : it extends in the case of collieries to the longer term contracts of accountants, managers, salesmen, solicitors, doctors, and, apparently, though how this would be applied where the company is dissolved is not explained, to managing directors engaged for a term of years. It applies to other personal contracts such as those to write a book or a play, or produce a film, or paint a picture. It covers property held without the right of assignment : in England in the case of leases it would forfeit the right reasonably to withhold consent : in Scotland, as I understand it, it would invalidate any condition based on law or contract of non-assignability. It would convey personal rights of action, as for instance a right to sue for defamation. It would transfer shares in companies which by their constitution allowed the directors a discretion as to the shareholders they admitted to their register. As I understood the argument, the transferee company was entitled by the order to be registered in respect of such shares.

When one regards the remarkable legal consequences of the construction adopted by the courts below one is driven to ask what the reasons may be supposed to be that brought about this revolution in the law, and that led to one class of person, companies under the Companies Act, being able to shake off the restrictions which bind ordinary persons, though only when they are minded to transfer their business to another and probably a larger company. Before 1928 no such privilege existed. Amalgamations, a vague term, were possible : companies could dispose of their undertaking to other companies. But it was necessary to invoke the machinery of a winding up : assets would be transferred by conveyances to which the liquidator was party : assignments had to be negotiated : and dissolution of the company could not take place until after the winding up had been completed. But all such sales of undertaking were subject to the ordinary law, and had of course to respect the rights of third parties. Nothing was transferable by a company that was not transferable by an individual: and in particular no one suggested that contracts of service could be transferred. On the contrary, a winding-up order or resolution operated as a discharge of existing servants, resulting in the right to claim damages for wrongful dismissal. It is true that the transferee company would ordinarily offer to employ the former servants of the transferor company: and an unreasonable refusal to accept such offer would mitigate or perhaps get rid of any damages. But the servant was left with his inalienable right to choose whether he would serve a new master or not.

Now the new procedure operates to remove much of the complexity of the former system. An arrangement can be made for transfer of an undertaking by way of amalgamation without incurring the necessity of a winding up. Once a winding up is avoided there is no longer a liquidator to control the transfer: and by the old device of a vesting order, property that previously had to be conveyed can be transferred, as the order in the present case says, without further act or deed. A further change is made. Under the former law a company could only be dissolved after the winding up had been completed, which involved delay until its liabilities had been met or compromised, either by arrangement with the new company, i.e., a novation, or by taking an indemnity from the new company, realizing or reserving assets sufficient to meet the liabilities. But as there is to be no winding up under the new system there has to be a special power of dissolution. This is given by s. 154, sub-s. 1 (*d*): but no time is fixed for dissolution; it need not be ordered at all; or if ordered can be postponed for any period that the judge may deem necessary. One other change is necessary; as the assets are to be vested in the new company, and an early dissolution is in most cases anticipated it is plain that the liabilities of this transferor company have to be provided for. Otherwise the transfer of the assets would very much resemble a fraudulent conveyance. This is dealt with by making the new company take over

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and so be responsible for the liabilities of the old. There has thus been provided a much more rapid mode of carrying out a reconstruction or amalgamation which avoids a winding up, an improved procedure akin to the various modern conveyancing provisions made in other statutes. But why this beneficent procedure should be tainted with the oppression and confiscation which in some cases would certainly be caused, or why in the interests of companies big or small for the mere purposes of an amalgamation it should violate all the rules as to transferability depending on some occasions on principles of our law and on other occasions on contract I cannot imagine. It is said that one company does not differ from another: and why should not a benevolent judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is two-fold. The first is that however excellent the new master may be it is hitherto the servant who has the choosing of him, and not a judge. The second is that it is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors do not attach importance to the identity of the particular company with which they deal. It would possibly hurt the feelings of financial gentlemen with large organizing powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns. But it is said how unreasonable this is: for the big company can buy the majority of the shares in the old company: replace the directors and managers: change the policy and produce the same result. Be it so: but the result is not the same: the identity of the company is preserved: and in any case the individual concerned, while he must be prepared to run the one risk, is entitled to say that he is not obliged to run the other. The truth is that this argument was tried out and repelled over forty years ago by Stirling J. in *Griffith* v. *Tower Publishing Co.* (1), where an author was held justified in refusing to allow his contract to be transferred to another company. The judgment is very apposite to the present

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(1) [1897] 1 Ch. 21.

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case. After deciding that there is no difference between publishing contracts with an individual and contracts with a company so far as assignability is concerned the judge said: "No doubt part of the inducement was also that the company "had a very efficient manager. It was said that the company "might have discharged him the next day without giving the "plaintiff cause to complain. That observation is well "founded. The company might have discharged its manager "the next day, and appointed new officers at any time; but "still the plaintiff might well act on the assumption that the "Tower Company and those who directed its affairs would "select a manager who would maintain the reputation of the "company. It seems to me that it would be wrong to draw "any such distinction as is suggested between an agreement "entered into by an author with an individual publisher and "a similar agreement between an author and a limited "company; and agreements of the former kind being non-"assignable, I hold that agreements of the latter description "are also incapable of being assigned."

Much stress has been laid on the general words in the definition clause, s. 154, sub-s. 4: "In this section the expression "'property' includes property rights and powers of every "description and the expression 'liabilities' includes duties." But it has been the duty of the Court on countless occasions to construe general words cutting down the generality to the obvious intention of the Legislature. The words of the learned author of Maxwell on Statutes, 8th ed., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the Legislature is presumed not to intend, and that a construction which would lead to any of them is therefore to be avoided, he continues: "One of these "presumptions is that the Legislature does not intend to "make any substantial alteration in the law beyond what it "explicitly declares, either in express terms or by clear "implication, or, in other words, beyond the immediate "scope and object of the statute. In all general matters "outside those limits the law remains undisturbed. It is "in the last degree improbable that the Legislature would "overthrow fundamental principles, infringe rights, or depart "from the general system of law, without expressing its "intention with irresistible clearness, and to give any such "effect to general words, simply because they have a meaning "that would lead thereto when used in either their widest, "their usual or their natural sense, would be to give them a "meaning other than that which was actually intended. "General words and phrases, therefore, however wide and "comprehensive they may be in their literal sense, must, "usually, be construed as being limited to the actual objects "of the Act. The general words of the Act are not to be so "construed as to alter the previous policy of the law." The learned author proceeds to illustrate this principle by instances which occupy several of the succeeding pages. I will only cite one application, *Leach* v. *Rex*. (1) The Criminal Evidence Act, 1898, had made the wife of an accused person a competent witness for or against him on charges of certain scheduled offences. The question arose on appeal to this House whether she was thereby made a compellable witness. The House, reversing the Court of Criminal Appeal, said no. Lord Halsbury said (2) : "You must consider, when you are dealing "with Acts of Parliament, and examining what the effect of "your proposed construction is, whether or not you are dealing "with something that it is possible the Legislature might either "have passed by definite and specific enactment or have "allowed to pass by some ambiguous inference . . . . If "you want to alter the law which has lasted for centuries and "which is almost ingrained in the English Constitution, in "the sense that everybody would say 'To call a wife against "' her husband is a thing that cannot be heard of '—to suggest "that that is to be dealt with by inference, and that you "should introduce a new system of law without any specific "enactment of it, seems to me to be perfectly monstrous." In the same case Lord Atkinson said (3) : "The principle that "a wife is not to be compelled to give evidence against her "husband is deep-seated in the common law of this country,

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(1) [1912] A. C. 305.
(2) Ibid. 310, 311.
(3) Ibid. 311.

"and I think if it is to be overturned it must be overturned "by a clear, definite, and positive enactment, not by an "ambiguous one such as the section relied upon in this case." My Lords, I should have thought that the principle that a man is not to be compelled to serve a master against his will is just as deep-seated in the common law of this country, as that which was under discussion in the case cited: and that here there is no clear, definite, or positive enactment overturning it. But in truth the general words in this section describing "property" seem to me to add nothing to the word "property" standing by itself which would be taken by any lawyer to include property, rights and powers of any description. Now it is to be noticed that in the Companies Act, 1908, s. 151, sub-s. 2 (*a*), the liquidator in a winding up was given power "To sell the real and personal property, "and things in action of the company by public auction or "private contract, with power to transfer the whole thereof "to any person or company, or to sell the same in parcels." This power is given in the same words in the Act of 1929, s. 191, sub-s. 2 (*a*). Now it is beyond controversy that the Act of 1908, s. 151, sub-s. 2 (*a*), in giving power to the liquidator to sell or transfer property did not give power to sell or transfer non-assignable property: and the same construction must be given to the powers given by the Act of 1929, s. 191, sub-s. 2. We should then have what appears to me to be the anomaly that while the liquidator's power to transfer property in a winding up is limited to assignable property, the Court's power in an amalgamation to transfer property extends to non-assignable property. I cannot think that this departure from observing the ordinary rights of property of third persons is even suggested, much less expressed in clear and unambiguous language. Indeed when I consider that the Court gets no power until it sanctions an arrangement made under s. 153, which must rest on agreement: and that there is plainly no right in the parties to agree to transfer what they have no right to transfer, and that such agreement can give no legal or equitable rights to anyone I am still further confirmed in my view. It was said how short and simple the procedure suggested was, and with what consternation practitioners in company work would view a reversal of the present decision. I am not satisfied that all company lawyers have taken the view which found favour below; and I am satisfied that the result which I favour will still allow very considerable advantages, and still be an improvement upon that system with which the company world did very well up to 1928. But a speedy transfer of property from A to B and a short, sharp dissolution of A though certainly simple does not necessarily do justice to A and still less to third parties who had dealings with A. I am satisfied that this in the main procedural section should not be construed so as to transfer rights which in their nature are by law not transferable. I am of opinion therefore that the appeal should be allowed with costs here and in the Court of Appeal and in the Divisional Court, and that in answer to the case the justices should be directed to dismiss the summons with such order as to costs as they think fit.

LORD THANKERTON. My Lords, I have had the privilege of considering the written opinions of my noble and learned friends Lord Atkin and Lord Romer; I find myself in agreement with the opinion of Lord Atkin, and regret that I feel bound to differ from Lord Romer's opinion, as also from the decision of both courts below.

The decision of the appeal turns on the proper construction of head (*a*) of the matters referred to in s. 154, sub-s. 1, of the Companies Act, 1929, namely, "the transfer to the transferee "company of the whole or any part of the undertaking and of "the property or liabilities of any transferor company," and of s. 154, sub-s. 2, which provides, "Where an order under "this section provides for the transfer of property or liabilities, "that property shall, by virtue of the order, be transferred "to and vest in, and those liabilities shall, by virtue of the "Order, be transferred to and become the liabilities of, the "transferee company, and, in the case of any property, if the "order so directs, freed from any charge which is by virtue "of the compromise or arrangement to cease to have effect."

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In sub-s. 4 property and liabilities are defined in wide terms. The construction which has prevailed in the courts below clearly involves that the right which a third party would otherwise have to prohibit a transfer by the transferor company, is at the mercy of the Court under this section. That necessarily involves an extension of the rights of the transferor company, and the corresponding extinction of a third party's rights. Lord Halsbury's remarks in *Leach* v. *Rex* (1), quoted by my noble and learned friend, appear to me to be directly in point. The point that raises the difficulty is the word "transferred." If it had been intended to effect a substitution of the transferee company in room and stead of the transferor company it would have been easy so to express it, but Parliament has not done so. This particular difficulty has not been mentioned or dealt with in the courts below, which appear to have been most impressed with the width of the definition of property and liabilities. I confess that the width of the definition does not impress me as favouring either construction, for, even if the word "transferred" had been qualified by such a phrase as "so far as transferable by the transferor company," the wide definition would have been equally necessary and appropriate. We are then left to a series of ingenious implications from other provisions in the section in order to give to the word "transferred" a meaning which I do not consider to be its natural meaning. If it had been intended to extinguish the rights of third parties, that should have been done "by a clear definite and positive enactment, not by an "ambiguous one such as the section relied upon in this case"; per Lord Atkinson in *Leach's* case. (2) I cannot believe that this matter was considered by Parliament; clearly the main object of these provisions which were first introduced in s. 54 of the Companies Act of 1928, was to facilitate the amalgamation of companies and to avoid the payment of duties on a whole series of deeds of transfer, etc.

It cannot be gainsaid that the rights of third parties which would be overridden or extinguished by the respondents' construction are, in many cases, of material importance and value. I will only add one illustration to those instanced by my noble and learned friend Lord Atkin. In the case of mineral leases it has long been settled in Scotland that a lease excluding assignees unless approved of by the landlord, has the same force with an unqualified exclusion; the tenant has no right under such a clause to require the landlord to justify his refusal, neither, if he does assign a reason, is that subject to the review of the Court: *Duke of Portland* v. *Baird & Co.* (1); Bell's Princ. s. 1218. In the *Duke of Portland's* case Lord Justice Clerk Inglis, after referring to the delectus personæ involved in certain leases, says (2): "But I think that both "the clause and the subject with which we are dealing suggest "a great many other considerations on the part of the landlord "than the mere consideration whether a particular assignee "or subtenant is an eligible man. It may in a mining district "like this be at one time a very beneficial proceeding for the "landlord under such a lease to take an assignee, and to take "an assignee of a particular character—an assignee or a "subtenant who will work out the minerals very rapidly. "It may at another time be his interest to receive no assignee "at all, or only an assignee or subtenant whose command "of capital, or whose enterprise, is not such as to be likely "to produce a very rapid working-out of the minerals. There "is a great competition and a great complication of interests "in such districts. There are a great many things to be "considered in the interest of a mineral proprietor besides "the mere solvency or sufficiency of the tenants in his mineral "leases; and I should say it is difficult to understand that a "landlord in making a lease of this kind should not have these "interests in his eye when he arranges with his tenant under "what conditions assignation or subtack is to be allowed. "Can anything be more natural—or, I should say, more "expedient—for the landlord, than that he should hold in his "hand the power, not of rejecting this or that assignee or "subtenant, but of determining absolutely, and with a view "to his own wishes and interests only, whether at any "particular time there shall be an assignation or subtack

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(1) [1912] A. C. 305.

(2) Ibid. 311.

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(1) (1865) 4 Macp. 10.

(2) Ibid. 18.

"at all?" In the absence of explicit provision to that effect, I am unable to find in the terms of s. 154 anything to deprive the mineral landlord of such a right.

Since writing this opinion I have had the privilege of considering the opinion just delivered by my noble and learned friend on the Woolsack, and the opinion of my noble and learned friend Lord Porter, with both of which I agree, as also in the motion proposed by the Lord Chancellor.

LORD ROMER. My Lords, this appeal raises a general question of difficulty and importance as to the construction of s. 154 of the Companies Act, 1929. It is the question whether the Court has power under this section to transfer to or vest in the transferee company, therein mentioned, property and rights of a transferor company which the latter company is itself incapable of assigning, or which it can only assign with the consent of some third party whose consent to the transfer has not been obtained. The question more particularly involved is whether the order made by Mr. Registrar Stiebel on June 4, 1937, was effectual to transfer to the respondent company all the rights and liabilities of the Hickleton Main Colliery Company, Ld., as they subsisted on that date, under and by virtue of the contract of employment entered into by the last mentioned company with the appellant. In other words, was the appellant, as from June 4, 1937, in the employment of the respondent company upon the terms of such contract?

It is plain that the proper answer to be given to these questions can only be discovered after a careful and critical examination of the language employed in s. 154. It is true that the section merely gives effect to an amendment of the law made by s. 54 of the Companies Act of 1928, but that Act was passed for the purpose of amending the law relating to companies with a view to the consolidation of such law effected in the following year, and never itself came into force. In order, therefore, to appreciate the objects that the Legislature had in view when making the amendment embodied in the section, it is necessary to consider how matters stood before

1929. For this purpose it will suffice to consider an amalgamation of a company with another carried into effect by means of an arrangement made between each company and its shareholders under the provisions of s. 120 of the Companies Act, 1908, now represented by s. 153 of the Act of 1929. The arrangement would provide for each company going into voluntary liquidation and for the sale of the whole undertaking and assets of each company by its liquidator to a third company to be formed for the purpose of acquiring them. It would also provide that the purchasing company should undertake and indemnify the liquidators against the liabilities of the two amalgamating companies. The arrangements having been sanctioned by the Court, and each company having gone into voluntary liquidation, the undertaking and assets of each company would be assigned to the new company by appropriate methods. Where any particular asset could only be transferred with the consent of some third party, it would be the duty of the liquidator of the transferring company to obtain that consent. Such an asset might consist of leasehold premises held subject to a covenant against assignment without the lessor's consent. I have never heard of a lessor's consent being refused in such a case, and it seems most unlikely that such a thing would occur in practice. But if it did, then, unless the covenant extended to parting with the possession of the demised premises, the difficulty might be got over by the transferor company executing a declaration of trust in favour of the new company, a step that would, upon the final dissolution of the transferor company, involve the appointment of a new trustee and a vesting order being made by the Court under the provisions of ss. 41 and 44 of the Trustee Act, 1925. Any difficulty encountered in dealing with shares in another company which were subject to restrictions on transfer could be overcome in like manner, the vesting order in the new trustee being effected under s. 51 of the last mentioned Act.

Another asset of the transferor company might be a trading contract for the purchase of the raw materials of its business. Unless it appears from the express terms of the contract or by

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necessary implication that it is to enure for the benefit of the assigns of the contracting parties, such a contract is not assignable at law: see *Tolhurst* v. *Associated Portland Cement Manufacturers*. (1) If, therefore, the new company were desirous of obtaining the benefit of the contract the liquidator of the transferor company would do his best to obtain a novation of the contract by arrangement between himself as representing the transferor company, the other party to the contract in question, and the new company. Failing this the other party to the contract would be entitled to treat the sale of the transferor company's undertaking as a repudiation of the contract by that company, and prove in the liquidation for such damages as he might have suffered by reason of the repudiation. The contract, however, might be one that was essential to the success of the undertaking. In such a case the parties to the scheme of amalgamation would, if there were any risk of failure to obtain a novation of the contract have adopted an alternative scheme of arrangement that is not an amalgamation in its strict sense but is one for all practical purposes. The new company would not purchase the undertakings of the two companies in question, but would purchase the shares in those companies in consideration of the allotment to the shareholders of fully paid shares in the new company. The two companies would not go into liquidation but would continue in existence as going concerns, each carrying on business in its own name; but the management of its affairs and the control of its assets would be in the hands of the new company. Under such a scheme there would of course be no transfer to the new company of any assets of the two amalgamating companies, but for every practical purpose the result would be the same as if every asset of those companies had been transferred whether by deed, declaration of trust, novation of contract or otherwise. For the scheme of arrangement with which I am contrasting a sale of the shares in the companies, would have been dependent upon the sanction of the court being obtained, and such sanction would never be given to an amalgamation of a solvent company with one

(1) [1903] A. C. 414.

which was commercially insolvent or concerning whose commercial solvency there was any reasonable doubt.

It remains to consider another class of contracts into which an amalgamating company may have entered, namely, contracts of service. So far as concerns its contracts with the more highly placed officials there will not in practice be found any difficulty. Whether the amalgamation being negotiated is one to be effected by a transfer to the new company of the undertaking and assets of the amalgamating companies or the purchase by the new company of the shares in those companies, one of the first things to be settled is who are to be the directors, managing directors, solicitors, auditors and so forth of the new company, or who are the persons who are to continue to occupy those positions in the amalgamating companies as the case may be. Compensation for those who are displaced, sometimes on what may appear to be a generous scale, will be provided by the scheme of arrangement. All of this is an essential commonplace of such schemes. But the contracts of service of those in a more humble situation, as for example, those serving behind the counter in a shop or those working underground in a colliery and whose services can be usually terminated by a comparatively short notice, will be left to the liquidator to deal with in the case of amalgamation proper, and will not need to be dealt with at all where the new company merely purchases the shares in the amalgamating companies. The making of an order for winding up by the Court operates no doubt as a notice of dismissal of a company's employees. But this is not the result, or at any rate is not necessarily the result, of the passing of a resolution for voluntary winding up: see *Midland Counties District Bank, Ld.* v. *Attwood* (1), and *Reigate* v. *Union Manufacturing Co.* (2) It would certainly not be the result of a voluntary liquidation of a company entered upon merely for the purpose of carrying through an amalgamation with another company by means of a sale of the company's undertaking and assets. In such a case the liquidator would carry on the business as before, making use of the employees' services and paying their wages, until the

(1) [1905] 1 Ch. 357.

(2) [1918] 1 K. B. 592.

time came for a transfer of the undertaking to the new company. The transfer would unquestionably operate as a notice of dismissal of the employees and the liquidator before making it should in strictness take timely steps to determine the existing contracts of service and give the employees the opportunity of entering into fresh contracts with the new company. In practice, I suspect, he does no such thing, relying on the willingness of the employees to serve the new company in spite of the fact that it might be governed by an entirely different lot of directors and managers and might be carrying on business under an entirely different name from those of the company whom he had contracted to serve. But such changes as these might well occur in the case of his original employers. Directors and managers may come and go. The whole policy and methods of trading of his employers may be changed in the space of a very short time by a new body of shareholders obtaining control of the company. Its very name may be changed: see s. 19 of the Act of 1929. Such changes as these must be expected by those who serve limited companies. The liquidator might well think, therefore, that an employee would not pay any regard to the fact that after the transfer he was serving a different legal entity, even assuming that the fact was one that he was capable of appreciating. The employee would serve and be paid by the new company in the same way as he had served and been paid by the old one. In such circumstances a novation of his contract of employment would be readily implied.

With the general creditors of the company the liquidator could take no risks. Except in so far as they might have become bound by the scheme of arrangement to accept other provisions they would be entitled to be paid by the liquidator, and, until they had been paid, the liquidator could not hand over the assets to the new company nor could the company be deemed to be dissolved under what is now s. 236 of the Act.

It will be manifest from the foregoing observations that many months might elapse after the Court had sanctioned an arrangement which provided for the amalgamation of two companies before the amalgamation would be " fully and effectively "carried out." It was in these circumstances that the amendment of the law embodied in s. 154 of the Act of 1929 was made.

Turning now to the section, the first thing to be noticed is that the Court may by order provide for the dissolution of the transferor company without winding up, and that this order may be made at the same time as the order sanctioning the compromise. In the present case the order providing for the dissolution of the Hickleton Main Colliery Company, Ld., was not in fact made until nearly two and a half months after the order sanctioning the arrangement. This, however, is immaterial. The important thing is that the Legislature contemplated that the two orders might be made at the same time. Now it is plain that until the arrangement is sanctioned by the Court, there can be no transfer to the transferee company of the undertaking or property of the transferor company. It is equally plain that if the dissolution of the transferor company takes place the moment that the arrangement is sanctioned, there can be no transfer thereafter of such undertaking or property whether by way of deed of assignment or declaration of trust or novation of contract or otherwise. The transferor company will have ceased to exist. The Court, has, no doubt, power under s. 294 of the Act to declare the dissolution of a company "to have been void." But the section would seem to be applicable only to cases where the company has been in compulsory or voluntary liquidation and the dissolution has been effected under the provisions of ss. 221, 236 or 245. Under those sections it is a condition precedent of dissolution that the affairs of the company have been completely or fully wound up; and where, owing to some liability or some asset of the company having been overlooked the condition precedent has not been fulfilled the Court can properly declare the dissolution "to have been void." But where the Court has under s. 154 brought about the dissolution of the company without a winding up I can see no grounds upon which the Court could possibly thereafter declare such dissolution "to have been void." It is moreover to be observed that the order under s. 294 is to be made upon an application by "the liquidator of the company or by any other "person who appears to the Court to be interested"; words that seem quite inapplicable to the case of a dissolution without a winding up. In these circumstances I should expect to find in the section some provision for vesting in the transferee company the whole of the undertaking and assets of the transferor company, lock, stock and barrel, and I shall not have expected in vain. For under sub-s. 1 (*a*) the Court is given power to make provision for the transfer to the transferee company of the undertaking property and liabilities of the transferor company and by sub-s. 2 the effect of making such provision is that the property thereupon becomes transferred to and vested in and the liabilities are transferred to and become the liabilities of the transferee company.

Now it is to be noticed that by virtue of sub-s. 4 the expression "property" includes property, rights and powers of every description. It includes therefore the rights of the transferor company under trading or service contracts, for the transferor company undoubtedly possesses rights under such contracts as well as liabilities, and such rights and liabilities become by virtue of the order transferred to and vested in the transferee company. Property passing by the order will also include assets that were only transferable by the transferor company with the assent of a third party, for such assets are property notwithstanding any restrictions upon their assignability. I cannot for myself think of any item of a company's undertaking and assets that would not be covered by the expression "property, rights and powers of every "description." If there were any, the Court could vest them in the transferee company under the power conferred upon it by sub-s. 1 (*f*) of making provision for such incidental consequential and supplemental matters as are necessary to secure "that the reconstruction or amalgamation shall be "fully and effectively carried out." These words are of great importance. Of equal importance is the very remarkable provision contained in sub-s. 1 (*c*). The Court apparently under that provision can by the order that puts an end to the transferor company enable the transferee company to continue *any* legal proceedings that have been instituted by or against the transferor company.

My Lords, the more closely I examine the section the more I am convinced that the object of the Legislature was to enable the Court by an order to make a complete substitution of the transferee company for the transferor company as regards the whole of the rights and liabilities of the latter without exception, and thus to secure, without delay and without the tedious formalities attendant upon a voluntary liquidation of transferor companies, that full and effective carrying out of the amalgamation that previously occupied so much time and involved the execution of so many documents and the making by the liquidators of so many arrangements with creditors, employees and others. Such, in my opinion, was the effect of the order made on June 4, 1937, by Mr. Registrar Stiebel in the present case. It follows that in my judgment the respondents were, as from that date, substituted for the Hickleton Main Colliery Company, Ld., in the contract of service made between the appellant and that company, as was held both by the Divisional Court and the Court of Appeal, and that the judgment of the Court of summary jurisdiction of November 19, 1937, was rightly made.

My Lords, I am by no means unconscious of the fact that the construction that I have placed upon s. 154 means that third parties who are in no way bound by the arrangement made by a company with its shareholders or creditors can be deprived by the Court of their rights without their consent. A landlord who has stipulated with his lessee that the demised premises shall not be assigned without his consent may find that the lease has become vested in a different lessee without his consent having been asked or obtained. A person who has contracted to supply goods or materials to one company, may find that without his consent he has become bound to supply the goods or materials to a different company. A servant may suddenly find himself obliged to render his services to a new master without his wishes having been consulted. It is said that in these and similar cases an injustice will be done by the section if it be construed as I have construed it. I must, of course, concede that, if there are two possible constructions of a statute of which the one will cause what seems to be an injustice and the other will not, the latter is to be preferred. "But," as was said by Lord Herschell in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1) "a sense of the "possible injustice of legislation ought not to induce your "Lordships to do violence to well-settled rules of construction, "though it may properly lead to the selection of one rather "than the other of two possible interpretations of the "enactment." With all respect to those who think differently I cannot, consistently with well settled rules of construction, so read the section as to avoid causing the alleged injustices to which I have referred. Take the case of the landlord. The lease is without question part of the property of the transferor company. How is it possible consistently with well settled rules of construction to exclude that property from the operation of the section? Property, moreover, for the purposes of the section includes rights of *every* description. Under its trading contracts and its service contracts the transferor company, as I have already said, undoubtedly possesses rights. What rule of construction will permit such rights to be excluded?

It is contended that an answer to these questions favourable to the appellant is to be found in sub-s. 1 (*a*), under which the Court may by the order make provisions for the transfer to the transferee company of the property and liabilities of the transferor company. The use of the word "transfer," so runs the argument, shows that the only property that can be affected by the order is property that the transferor company can by itself transfer. But there seem to me to be several objections to this argument. In the first place the transfer for which provision may be made is not a transfer by the transferor company at all. It is not, indeed, a transfer that is to be made by anybody. The making of the provision for a transfer is merely the machinery for bringing into operation the vesting of the property in the transferee company under sub-s. 2. In the next place, the provision for transfer extends

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(1) [1894] A. C. 508, 516.

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not only to property but to liabilities; and the transferor company could not by itself transfer its liabilities to the transferee company so that, to use the words of sub-s. 2, they become the liabilities of the transferee company. The word transfer cannot have one meaning when applied to liabilities and a more restricted meaning when applied to property. Finally the section contemplates that the order that provides for the transfer may also provide for the contemporaneous dissolution of the transferor company, in which case any property of that company of which the transfer is not provided for by the order can never be transferred to and vested in the transferee company at all. The words of the section seem to me to be quite unambiguous, and I am not prepared to depart from what appears to me to be the plain meaning of the section by reason of the possible injustices that it may cause.

Nor can I see any good reason for supposing that the injustices to which I have referred, if they can properly be so called, were not within the contemplation of the Legislature. No one can doubt that by an order under s. 154 the Court can vest the liability of the transferor company for a simple contract debt in the transferee company by the same order that causes the extinction of the former company. The result is that a man who has given credit to a company that he knows suddenly finds that he has to rely upon the credit of a company of which he knows nothing and without any remedy against his former debtor. The injustice, such as it is, inflicted upon him differs in no material respect that I can see from that inflicted upon the landlord, the contractor, and the servants of the company. If the injustice in the former case was within the contemplation of the Legislature, as it must, in my opinion, be assumed to have been, I can see no reason for thinking that the injustice in the latter cases was not equally within its contemplation.

But in truth it is an exaggeration to use the word injustice in such a connection as the present. If all or the large majority of the shares in one company are acquired by another, the first company will almost certainly come under the control of new directors and managers carrying out a policy that may differ widely from that of their predecessors. Yet no one could possibly say without gross exaggeration that the landlord, the contractors, or the servants of the first company had suffered an injustice. Their position nevertheless would differ little for any practical purpose from the position they would be in had the first company become amalgamated with the second company by means of an exercise of the powers conferred on the Court by s. 154 of the Act, construing those powers as I think they should be construed.

My Lords, for these reasons I would dismiss this appeal.

LORD PORTER (read by LORD THANKERTON). My Lords, The facts in this case have been fully stated by my noble and learned friend Lord Atkin and it is unnecessary for me to repeat them. It is clear from that statement that the solution of the question at issue depends upon the true construction of ss. 153 and 154 of the Companies Act, 1929, and primarily of the latter of those two sections. The vital words are :—

"154.—(1.) . . . . the court may, either by the order "sanctioning the compromise or arrangement or by any "subsequent order, make provision for all or any of the "following matters :—(*a*) the transfer to the transferee "company of the whole or any part of the undertaking and "of the property or liabilities of any transferor company ; "(*c*) the continuation by or against the transferee company "of any legal proceedings pending by or against any transferor "company ; (*d*) the dissolution, without winding up, of "any transferor company ; (*f*) such incidental, consequential "and supplemental matters as are necessary to secure that the "reconstruction or amalgamation shall be fully and effectively "carried out.

"(2.) Where an order under this section provides for the "transfer of property or liabilities, that property shall, by "virtue of the order, be transferred to and vest in, and those "liabilities shall, by virtue of the order be transferred to and "become the liabilities of the transferee company, and in the "case of any property, if the order so directs, freed from any "charge which is by virtue of the compromise or arrangement "to cease to have effect.

"(4.) In this section the expression 'property' includes "property rights and powers of every description, and the "expression 'liabilities' includes duties."

It will be seen from the wording quoted that the matter to be determined is what is included under the word "property" in sub-s. 1 (*a*) as defined in sub-s. 4. The sections give a new power to the Court to reconstruct or amalgamate companies, a power which was first given by the Companies Act of 1928. That Act, however, was passed by way of preparation for the inclusion of its provisions in the Consolidating Act of 1929 and never came into force. The provisions now to be considered therefore may be regarded as coming into effect as a result of s. 154 in the Act of 1929. Before that date no such power of reconstruction or amalgamation existed. If an amalgamation had previously to be effected it could have been accomplished by winding up one or both of the original companies. Alternatively, a somewhat similar result could have been obtained by transferring the shares of both to a holding company. The actual amalgamation of the two companies could not have been carried out directly by an order of the Court. Sect. 154 now gives power to a judge of the Chancery Division to take a short cut and avoid the delay and expense of following the course previously imperative.

The question at issue is, does it do more than this ? Does it by an executive act transfer to the new body all the contractual rights of the original companies in spite of any safeguards against transfer whether express or implied contained in their contracts with third parties ? Does it transfer contracts by their terms non-transferable and those, such as contracts of service, which at common law could not have been transferred without the consent of both parties ? Undoubtedly to effect such a result would be to make a momentous change in the law as it previously stood, a change which from one point of view affects companies only, but from the other, affects many individuals who have entered into contracts with them. The same considerations might perhaps be raised by asking the question, is s. 154 procedural only, enabling what previously could have been accomplished by one method to be carried out by another, or does it change the rights of third parties vis-a-vis the company ?

I do not find myself assisted at this stage by a consideration of the probability or improbability that the Act intended to produce the one result or the other. Primarily I think the question is one of construction. The argument on behalf of the respondents which was accepted in the Court of Appeal was that the transfer of " property " spoken of in sub-s. 1 (*a*) which is said by sub-s. 4 to include property rights and powers of every description must include every contract of the original companies and that words so wide must be held to substitute the amalgamated company for the original constituent companies so that the amalgamated company must be held to be as it were the same entity as each of the old companies and to succeed to all their contracts without requiring the consent of other interested parties to the change.

I will consider the meaning of the word " property " itself later on ; for the moment I desire to consider the words with which it is associated. In the first place, I do not think its meaning is elucidated by the fact that it is found in collocation with the word " undertaking." " Undertaking " is, I think, inserted in order to make it plain that the business will be transferred as a going concern. Nor, in my view, does the definition in sub-s. 4 settle the question in favour of the respondents. " Property rights and powers of every des-"cription " is not to me a familiar phrase. I should have thought that the additional words added after " property " are merely inserted in order to make sure that all the assets of which the original company could dispose were transferred to the amalgamation. Indeed without them I think it might have been contended that the right, which the original company possessed to call up uncalled capital was not transferred, or, at any rate, there might be some doubt in the matter : see *Bank of South Australia* v. *Abrahams* (1)

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(1) (1875) L. R. 6 P. C. 265.

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and *Howard* v. *Patent Ivory Manufacturing Co.* (1) An examination of the decisions in those two cases at least suggests the desirability of adding the words "rights" or "powers" or both in defining the property to be transferred. Nor do I find myself assisted by a consideration of the word "liabilities," or the definition which includes duties within it. A company to which the undertaking of another company is transferred at the instance of the latter and by its own consent, must necessarily, if justice is to be done, undertake the liabilities towards third parties under any contracts entered into by the original company. If it did not both the original and the amalgamated company would escape all liabilities to servants and contractors: the original company upon its dissolution as contemplated by s. 154, sub-s. 1 (*d*), of the Act, and the amalgamated company because no liabilities would have been transferred to it.

The shareholders and creditors of the companies to be amalgamated are the initiators of the steps taken and need not enter into the compromise or agreement unless they wish. They alone are entitled to be represented when the arrangements for the amalgamation are being made, and before the Court when application is made to it under s. 154. Moreover, under s. 155 provision is made as to dissenting shareholders. On the other hand contractors, unless creditors, and employees have no say in the matter and are not entitled to be represented at any time.

In these circumstances I do not see why the amalgamated companies as a recompense for undertaking the liabilities of the original company should obtain under s. 154, sub-s. 1 (*a*), the benefit of the contracts which by their nature are not transferable. Nor do I think any such result follows, though s. 154, sub-s. 1 (*c*), provides that liabilities or alleged liabilities which have resulted in the taking of proceedings against the original company are to be treated in the same way as liabilities which have not so resulted, and provides that they are to be transferred to the amalgamated company. In the former case the Court which is asked to

(1) (1888) 38 Ch. D. 156.

sanction the arrangement can assure itself that the assets of the amalgamated company are sufficient to answer liabilities already incurred: to discover whether that company can meet its future liabilities is a different and more difficult matter. In the latter it merely makes a similar provision where the liability has already given rise to the issue of a writ.

Sect. 154, sub-s. 1 (*c*), also enacts that the Court may order legal proceedings by the original company to be transferred to the amalgamated company. Such claims seem to me to have nothing in common with contractual obligations where no cause of action has arisen. There is no question of transferring a contract against the will of the defendant. All that is provided for is that an accrued right should be enforceable after substituting one plaintiff for another in an action which in the case of a winding up a liquidator would have been entitled to continue under the Act of 1908 and, where no amalgamation had taken place, would have been entitled to continue to-day.

Having regard to these considerations I find myself thrown back upon a consideration of the meaning to be placed on the word "property" in sub-s. 1 (*a*). Prima facie I should not expect it to include non-transferable contracts. In truth the word "property" is not a term of art but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal. The word is used in many Acts of Parliament but I propose to confine myself to the Companies Acts themselves. The Companies (Consolidation) Act, 1908, s. 122 and following sections, and the Companies Act, 1929, s. 156 and following sections, deal with winding-up. Sect. 151, sub-s. 2, of the former Act enacts that,—

"(2.) The liquidator in a winding up by the Court shall "have power, but (subject to the provisions of this section) "in the case of a winding up in Scotland or Ireland only with "the sanction of the court,—(*a*) to sell the real and personal "property, and things in action of the company by public "auction or private contract, with power to transfer the "whole thereof to any person or company, or to sell the same "in parcels: . . . . (*g*) to do all such other things as may "be necessary for winding up the affairs of the company and "distributing its assets."

Sect. 189 of the latter Act contains similar provisions. In neither case has it ever, so far as I know, been suggested that "property" included anything other than property of which the company then in course of being wound up could dispose. Certainly the word "property" in those sections does not include personal contracts. Indeed winding up by the Court constitutes a dismissal of the company's employees for which they are entitled to compensation as for wrongful dismissal.

No doubt it would simplify the administration of the sections now under consideration if the amalgamated company were held to be substituted for the original company and to succeed to all its liabilities and contracts whether transferable or not. But ease of administration is not everything, and, if so great an alteration in the law as it previously existed is to be made, a clear expression of its intention must be given by the Legislature. I find no such clarity in s. 154. Indeed one can point to a number of difficulties which would arise if the construction put forward by the respondents were to be adopted. One example may suffice. A company may have contracted to take all its requirements from a third party or may have appointed a general manager or managing director for all its undertakings: how could the quantum of those requirements be ascertained or the area of the undertaking which had to be supervised be known after the amalgamation was effected? No doubt the amalgamated company would be liable in damages if they failed to take the necessary material or employ the manager, but that is merely to adopt the construction suggested by the appellant and not to solve the difficulty posed by the respondents' construction of the Acts.

Apart from these considerations I do not myself feel that in this particular case any great hardship would be imposed upon the appellant if the respondents' construction were accepted. Workmen are entitled to, and must receive, the same consideration as any other employees of the company, but their contracts are for a short term and no serious disadvantage is likely to be caused by their being transferred without their consent to a new company for a period of a week or a fortnight. I can imagine the Legislature entrusting to a judge of the Chancery Division the task of seeing that their interests were properly protected. But the argument cuts both ways; just as no great hardship would be caused, so no great difficulty would arise if the original company were compelled to give a week or a fortnight's notice to their employees with an intimation that the amalgamated company would be prepared to accept their services as soon as it was formed.

On the other hand the appellant's interpretation of the section would safeguard alike the interests of the workman and of those with long-term contracts and of any other persons who either by express words or implied terms were under no obligation to accept a substituted party to their contracts in the place of the party with whom they had originally come to terms. I am prepared to accept the view that to place in the hands of the Court the right to make a change of the kind suggested would be of some advantage in preventing those who had contracted with the original company from endeavouring to obtain some undue advantage as a condition of their consenting to supply or serve the amalgamated company. There are, it is true, advantages and disadvantages in either construction; but the change contended for is a grave one and in my opinion the wording of the section is far from being sufficiently precise to have the suggested effect.

I may sum up my view by saying that the word "property" in s. 154, whether considered alone or in conjunction with the words "rights and powers of every description" means property with which the original company has the right to deal without having to obtain the consent of some third party, and I cannot think that the addition of s. 154, sub-s. 1 (*f*), empowering the Court to make provision for incidental consequential and supplementary matters is sufficient to widen the content of the section so as to include non-transferable contracts. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Hosking & Berkeley, for J. W. Fenoughty, Dunn & Co., Rotherham.*

Solicitors for respondents: *Bird & Bird, for Gichard & Co., Rotherham.*

[PRIVY COUNCIL.]

PUNJAB CO-OPERATIVE BANK, LIMITED, AMRITSAR . . . . . APPELLANT ;

J. C.*
1940
July 22.

AND

COMMISSIONER OF INCOME-TAX, LAHORE . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

India—Appeal to Privy Council—Competency—Government of India Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 42), *s.* 205—*Construction.*

Bank—Sale of securities—To meet withdrawals—Act done in carrying on the banking business—Profit on sale of securities taxable—Indian Income-tax Act (*XI. of* 1922), *s.* 10.

Sect. 205, sub-s. 1, of the Government of India Act, 1935, provides that: "An appeal shall lie to the Federal Court from "any judgment, decree or final order of a High Court in British "India, if the High Court certifies that the case involves a "substantial question of law as to the interpretation of this "Act or any Order in Council made thereunder, and it shall be "the duty of every High Court in British India to consider in "every case whether or not any such question is involved and "of its own motion to give or withhold a certificate accordingly":—

Held, first, that the section does not provide for a case where no certificate has been given, and that in such a case there is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal. If, however, it becomes manifest that the High Court, by some mischance or inadvertence or forgetfulness, has neglected its duty to give a certificate in a case where a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder was, or might reasonably be, involved, the Board ought to decline to hear the appeal until the High Court have had an opportunity of giving or withholding a certificate.

Held, secondly, that the requirement in the section that it shall be the duty of every High Court in British India to consider in every case whether or not a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is involved, and of its own motion to give or withhold a certificate accordingly, is directory, and not mandatory, and that that duty is only imposed on judges of the High Court in cases where there is a reasonable possibility that such a question may arise.

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* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN, and MR. M. R. JAYAKAR.

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Where, therefore, there was no possible ground for thinking that any such question could be involved in the appeal, and there was no certificate by the High Court, His Majesty in Council had jurisdiction to hear the appeal.

Errol Mackay v. *Oswald Forbes* (1940) L. R. 67 I. A. 64 examined and explained.

The realization by a bank of some of its securities in order to meet withdrawals by depositors is a normal step in carrying on the banking business, and the amount realized on the sale of the securities over their cost price is taxable as part of the profits of the business of the bank.

Principle in *Californian Copper Syndicate* (*Limited and Reduced*) v. *Harris* (1904) 5 Tax Cas. 159, applied.

Dicta in *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co.* (1931) 16 Tax Cas. 381, at pp. 388–9, disapproved.

Judgment of the High Court affirmed.

APPEAL (No. 71 of 1939) from a judgment of the High Court (February 3, 1938) on a reference by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, under s. 66, sub-s. 2, of the Indian Income-tax Act, 1922.

The question raised by this appeal was whether or not the profit realized by the appellant, the Punjab Co-operative Bank, Ld., Amritsar, on the sale of certain securities was a profit liable to income-tax under the Indian Income-tax Act, 1922.

The facts appear from the judgment of the Judicial Committee, and the questions referred by the Commissioner were: (1.) "Whether in the circumstances of the case the "amount of Rs.1,42,588 realised by the assessee on the sale "of securities and shares over their cost price is taxable"; and (2.) "Whether under the circumstances of the case the "net interest amounting to Rs.2764 received from vendees "of securities on de die in diem basis is taxable."

The High Court (Addison and Din Mohammed JJ.) answered both questions in the affirmative.

On the hearing of the present appeal a preliminary objection was taken by the respondent as to the jurisdiction of His Majesty in Council, by reason of the provisions of s. 205 of the Government of India Act, 1935, to hear the appeal. The terms of s. 205 appear from the judgment of the Judicial

Committee. In the present case the High Court had certified under s. 66A of the Indian Income-tax Act, on the petition of the Appellant Bank, that the case was a fit one for appeal to His Majesty in Council.

1940. June 25, 26, 27. *J. M. Tucker K.C.* and *W. Wallach* for the respondent. The preliminary objection to the jurisdiction of His Majesty in Council to hear this appeal arises out of the decision of the Board in *Errol Mackay* v. *Oswald Forbes* (1) as to the effect of s. 205 of the Government of India Act, 1935. [The section was read.] If there is a case which does involve a substantial question of law as to the interpretation of the Act of 1935 or any Order in Council made under it, and the High Court certifies that such a question is involved, then no appeal lies to His Majesty in Council either with or without special leave. It is not suggested that any such question is involved in the present case. The burden of the decision in the *Errol Mackay* case (1), however, is wide enough to make it necessary for the High Court in *every* case where there is a judgment, decree or final order to consider whether or not there is a question in the case which involves the interpretation of the Government of India Act. The *Errol Mackay* case (1) did involve the interpretation of a section of an Act as amended by an Order in Council made under the Government of India Act, and therefore came within the words of s. 205. In *every* case where there is a judgment, decree or final order the duty of the High Court is to consider whether any question in that judgment raises a question of the interpretation of the Government of India Act or any Order in Council made thereunder, and they must then certify one way or the other—the High Court is required of its own motion "to give or withhold a certificate "accordingly." The decision in *Errol Mackay's* case (1) requires the High Court to state definitely that a certificate is being withheld. If a certificate is given, then this Board has no jurisdiction. In the present case it is not known whether it has been affirmatively withheld, and that is why

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(1) (1940) L. R. 67 I. A. 64.

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the Board has said that it must be stated one way or the other, because until that is known there is a doubt as to the jurisdiction of the Board. If the High Court have considered the question, and have withheld a certificate, then the matter is at large, and is to be decided according to the ordinary rules governing appeals. The certificate in this case is clearly not one under s. 205. It has been held by the Federal Court in India that the words " judgment, decree or "final order" in s. 205 include judgments or orders or convictions in criminal cases, and therefore if the *Errol Mackay* case (1) is of application the same procedure will have to be gone through in every criminal case. It may be that this Board will say that although the words in the *Errol Mackay* case (1), " in every case," were very wide, what was meant was in every case like the one with which the Board was then dealing: *Ramsumran Prasad* v. *Shyam Kumari* (2), where it was said: " If the language in the "sentence quoted is rather wide, no-one referring to the case "could be misled by it." (3) It is submitted, however, that the decision in *Errol Mackay's* case (1) is clear and unequivocal, and that it follows the words of the section. The contents of s. 205 are the pivot on which the right of appeal of the litigant turns, and therefore the duty is put on the High Court to give or withhold a certificate of its own motion, and if it fails to do so, the matter is left in the air at that stage. This preliminary objection will of course fall altogether if a judgment of the High Court on a reference under the Indian Income-tax Act is not a " judgment " within the meaning of s. 205. It is submitted that the decision of the High Court on such a reference is a " judgment " : *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay* (4) ; *Bulaqi Shah* v. *Collector of Lahore* (5) ; *Prabhat Chandra Barua* v. *Emperor* (6) ; *Shahzadi Begam* v. *Alakh Nath* (7) ; and *In re Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar.* (8)

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(1) L. R. 67 I. A. 64.

(2) (1922) L. R. 49 I. A. 342.

(3) Ibid. 348.

(4) (1923) L. R. 50 I. A. 212, 218, 226.

(5) (1924) I. L. R. 6 Lah. 30.

(6) (1924) I. L. R. 52 C. 546.

(7) (1935) I. L. R. 57 A. 983.

(8) (1935) I. L. R. 13 R. 457.

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There is a further difficulty—whether s. 205 can be said impliedly to have repealed s. 66A, sub-s. 2, of the Indian Income-tax Act, under which the High Court certified that the present case was a fit one for appeal to this Board. If an income-tax case involved a substantial question of law as to the interpretation of the Government of India Act or any Order in Council under it, and a certificate was given, then the Board could not hear the appeal notwithstanding s. 66A, sub-s. 2, and the case could not come before the Board at all. The respondent must contend that s. 66A, sub-s. 2, has been repealed by implication.

The words of s. 205 are " where such a certificate is given ". . . . no direct appeal shall lie to His Majesty in Council." There is an indirect appeal given by s. 208 of the Government of India Act. The appeal, therefore, would have to go through the Federal Court, who would then decide the question of construction of the Act or Order in Council, and then the matter could come before this Board if the Federal Court give leave or if the Board give leave.

Raymond Needham K.C. and *N. E. Mustoe* for the appellant. In the *Errol Mackay* case (1) there was a point standing out which involved the Government of India Act. It was an obvious point in the case ; a question might arise for this Board whether it was a substantial point or not, because it has to be a substantial point in order to come within the scope of s. 205 ; hence the remission of the case for the Board to be informed as to the opinion of the High Court. Anything that was said by this Board in *Errol Mackay's* case (1) must be read, and very closely read, in the light of the very special facts of that case which, by its very nature, was one which came within the range of the Government of India Act. In the present case there is no such question. The High Court knows the Government of India Act, knows the Indian Income-tax Act, and knows that there is nothing in the Government of India Act about income-tax. The position, then, has to be looked at on those facts in relation to s. 205, and what is there in this case to show that that knowledge

(1) L. R. 67 I. A. 64.

has not been used by the High Court in this case ? They have not certified that this is a substantial question, and therefore up to that point the right of appeal to this Board remains. There is nothing to show that the High Court has not considered the point, and it is submitted that in such an obvious case as this the presumption is that the point was before the High Court.

[VISCOUNT MAUGHAM. Their Lordships are satisfied that they have jurisdiction to hear the appeal, and will give the reasons for their decision later.]

The hearing of the appeal was then continued.

Raymond Needham K.C. The profit on the sales of the securities was Rs.1,42,588. The main contention is that these securities were not bought by the appellant bank for the purposes of resale, but for the purpose of reinvestment, and for keeping to meet exceptional calls on the bank's resources, and the profit on that sale was not a profit arising in the course of the bank's trade. The securities were bought at various dates, and the sales were made in exceptional circumstances. The only point is whether or not this was a trading profit of the bank. Dealing in Indian Government securities formed no part of the business of the appellant bank, and no securities were purchased for the purpose of being sold at a profit. The judgment of the High Court is right in that it asserts that it is a question of fact in each case whether or not the investment was a part of the ordinary business of the bank. They are wrong, however, in the view that there was evidence upon which the Commissioner could take the view which he did. It is submitted that there was evidence upon which the Commissioner could find that it was not a trading profit if the right principle had been applied. [Reference was made to *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co., Ld.* (1) ; *Northern Assurance Co.* v. *Russell* (2) ; *Liverpool and London and Globe Insurance Co.* v. *Bennett* (3) ; and *Westminster Bank, Ld.* v. *Osler* (*H.M. Inspector of Taxes*). (4)] There must be a finding that the purchase was made with the intention of selling at a profit—in other words, of initiating a trade: *Devon Mutual Steamship Insurance Association* v. *Ogg*. (1) There must be a profit-making intention when the thing is bought; when one gets into the region of investment, even by a banker, the precise business involved must be looked at. No facts were found upon which the conclusion can properly be drawn that the sales in question were trading transactions; and the judgment of the High Court was wrong in their view that there was such a finding.

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(1) (1931) 16 Tax Cas. 381.

(2) (1889) 2 Tax Cas. 571, 577–8.

(3) [1913] A. C. 610.

(4) [1932] 1 K. B. 668 ; [1933] A. C. 139.

J. M. Tucker K.C. The assessability or otherwise of the profits arising from the sales of the securities and shares in question depends upon whether the bank was carrying on a business; whether such business was of such a nature as to involve the purchase and sale from time to time of securities and shares, and whether the purchases and sales in question were transactions effected by the bank in the ordinary course of carrying on that business. All such questions are wholly or mainly questions of fact, and were answered by the Assistant Commissioner in the affirmative, and there was ample evidence to support his findings. The original investment was a transaction made in the ordinary course of the banking business; when the investment is sold and turned back into money, that is also a transaction in the ordinary course of the banking business, and if two transactions in the ordinary course of the business produce a profit, then that is a profit from the business, and is taxable under the Act—it falls under s. 10. This is part of its ordinary floating capital, in which it deals. The making of the investments and the sale of them were transactions linked up with the acceptance of the deposits and the repayment of the deposits. In *J. Gliksten & Son* v. *Green* (2) it was held that a sum received from fire insurance in respect of timber lost by fire was a receipt in the course of the business and had to be brought in, despite the submission that it was no part of a timber merchant's business to trade in fires. This Board has also held that where loss of profits has been insured against the amount recovered is to be brought in

(1) (1927) 13 Tax Cas. 184, 201.

(2) [1929] A. C. 381.

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as a trade receipt: *Rex* v. *B. C. Fir and Cedar Lumber Co.* (1) The present matter comes within the principle in *Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)* (2) that "enhanced values obtained from realisation "or conversion of securities may be so assessable, where what "is done is not merely a realisation or change of investment, "but an act done in what is truly the carrying on, or carrying "out, of a business." (3) [Reference was also made to *Scottish Investment Trust Co.* v. *Forbes (Surveyor of Taxes)*. (4)] The question on the present facts is purely one of fact—in these circumstances and facts were these sums taxable? The finding of the Assistant Commissioner that they were taxable is unassailable.

Raymond Needham K.C. replied. The argument of the respondent gives the go-by to *Liverpool and London and Globe Insurance Co.* v. *Bennett* (5) and *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co., Ld.* (6) Those two cases are authority to show that the sale of investments necessarily made by the company in the course of its business, the sale of which was contemplated by its memorandum, and the investments being necessary to meet the company's liabilities, was not a sale producing a taxable profit.

1940. July 22. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM. This is an appeal from a judgment of the High Court of Judicature at Lahore, dated February 3, 1938, delivered on a reference under s. 66, sub-s. 2, of the Indian Income-tax Act (XI. of 1922) by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces.

The appellant (hereinafter referred to as the bank) is a joint stock company, incorporated in the year 1905, carrying on the business of banking. The objects for which the bank was established are set out in para. 3 of its memorandum of association, and include: "(A) To carry on in India and "elsewhere the trade or business of banking in all its branches, "and to transact and do all matters and things incidental "thereto, or which may at any time hereafter be usual in "connection with the business of banking or dealing in money "or securities for money."

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(1) [1932] A. C. 441.
(2) (1904) 5 Tax Cas. 159.
(3) Ibid. 166.
(4) (1893) 3 Tax Cas. 231.
(5) [1913] A. C. 610.
(6) (1931) 16 Tax Cas. 381.

Paragraph 82 (i.) of the articles of association provides that the directors "may invest funds of the Company upon "such securities or investments as they may think advisable; "from time to time, vary such securities and investments, "and convert the same, as occasion may require or as they "may deem expedient, but they shall not invest or employ "any part of the funds of the Company in the purchase of its "own shares."

The profits of the Bank derived from its business during the year 1935 were assessable to income-tax in the year 1936–37, which is the year of assessment involved in this appeal.

The High Court, on February 3, 1938, decided that on the facts stated in the statement of the case drawn up by the Commissioner of Income-tax under s. 66, sub-s. 2, of the Income-tax Act, a question propounded by the Commissioner must be answered in the affirmative, with the result that the amount of Rs.1,42,588 realized by the bank on the sale in 1935 of certain securities and shares over their cost price is taxable as part of the profits or gains of the business of the bank which arose in 1935 (see s. 10 of the Income-tax Act).

On June 17, 1938, the High Court certified under s. 66A of the Income-tax Act, on the petition of the bank, that the case was a fit case for appeal to His Majesty in Council. As it happened, the two learned judges who gave this certificate were those who heard and decided the case on February 3, 1938.

On the appeal coming on for hearing before their Lordships, a preliminary objection to the appeal was taken, which has been elaborately argued, and it seems desirable in the first place to deal with this objection. It is based on the contention that no direct appeal now lies to His Majesty in Council from

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any judgment, decree or final order made by any High Court in British India unless that Court has recorded that it *withholds* the giving of a certificate that a substantial question of law as to the interpretation of the Government of India Act, 1935, is involved. That is said to be the effect of s. 205 of the Act, and reliance is placed on a decision of their Lordships in a recent case, which must be considered later. Sect. 205 is in the following terms :—

" (1.) An appeal shall lie to the Federal Court from any
"judgment, decree or final order of a High Court in British
"India, if the High Court certifies that the case involves a
"substantial question of law as to the interpretation of this
"Act or any Order in Council made thereunder, and it shall
"be the duty of every High Court in British India to consider
"in every case whether or not any such question is involved and
"of its own motion to give or withhold a certificate accordingly.

" (2.) Where such a certificate is given, any party in the
"case may appeal to the Federal Court on the ground that
"any such question as aforesaid has been wrongly decided,
"and on any ground on which that party could have appealed
"without special leave to His Majesty in Council if no such
"certificate had been given, and, with the leave of the Federal
"Court, on any other ground, and no direct appeal shall lie
"to His Majesty in Council, either with or without special
"leave."

The object of this section is plain. It is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder (which, for brevity, will be referred to hereafter as the " specified question "of law "), the appeal, if any, that is, the direct appeal, shall lie to the Federal Court. The word " direct " is used because s. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council ; but nothing turns on this for the present purpose.

The means adopted in the section to carry out the above object are these : (1.) The appeal is stated to lie to the Federal

Court if the High Court certifies that the specified question of law is involved, and is a substantial question. (2.) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law, being a substantial question, is involved. This part of sub-s. 1 contains some other important words which will be considered later. (3.) Where such a certificate is given, any party in the case may appeal to the Federal Court on defined grounds (sub-s. 2). (4.) Where such a certificate is given no (direct) appeal shall lie to His Majesty in Council, even with special leave (sub-s. 2).

It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and a fortiori there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise.

What, then, is the position if it becomes manifest to the Board that, by some mischance, or inadvertence or forgetfulness, the High Court has neglected its duty under the latter part of sub-s. 1 to give a certificate in a case where the specified question of law is, or may reasonably be, involved? It is plain that it is for the High Court, not this Board, to determine whether the question is involved, and, if so, whether it is substantial. In such an event, although the jurisdiction of His Majesty in Council has not been affected, since there has been no certificate, nevertheless there has been a dereliction of duty by the High Court, and the Board, in accordance with the principles on which it is accustomed to act in tendering advice to His Majesty, would not think it right to hear the appeal until a proper certificate has been obtained, or it is on record that a certificate has been withheld.

The precise event in fact happened in the recent case of *Errol Mackay* v. *Oswald Forbes*. (1) It seemed to the Board that a question of interpretation arose under an Order in Council made by virtue of s. 293 of the Government of India Act, 1935. There was no certificate by the High Court. It was suggested by counsel for the appellants that the Court might have considered s. 205, and might have decided to withhold a certificate, though that decision was not expressed. Their Lordships expressed the view that this was unlikely in that case, and in the absence of a certificate they thought that the appeal should be dismissed with costs. They added, however, that if the High Court should thereafter make an order withholding a certificate under s. 205, the appellants were to be at liberty to apply to His Majesty in Council to have the appeal restored.

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(1) (1940) L. R. 67 I. A. 64.

Their Lordships are of opinion that this order was perfectly correct, not because s. 205 took away the jurisdiction in a strict sense of His Majesty in Council, but for the more general reason indicated above. They will add that the course taken of dismissing the appeal was, no doubt, to some extent due to the circumstance that the Board entertained little doubt that the certificate would be given. If the case had been one in which there was a real doubt whether the certificate would be given or withheld, a more lenient course might have been taken, and the appeal might have been directed to stand over until the High Court had either given a certificate or decided to withhold it.

It remains to consider what the position is, and what course should be taken by the Board, when the appeal is from the High Court and no such specified question of law can with any reasonable probability be thought to be involved, and where, not unnaturally, the High Court have neither granted a certificate nor recorded that a certificate is withheld. The first question here is whether in such a case s. 205 applies at all, and at this point it is necessary to examine the language in the latter part of sub-s. 1 in order to determine the nature of the duty imposed upon the High Court. The language is of a very comprehensive kind. The duty is to be that of "every High Court in British India." It is to consider "in every case" whether or not the specified

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question is involved. And, finally, the Court is "of its own "motion" to give or to withhold a certificate accordingly. Their Lordships, however, are of opinion that this part of sub-s. 1 is directory, in the sense in which that word is used in the well known distinction between enactments, or phrases in them, which are mandatory or absolute and those which are merely directory. There are several reasons for this conclusion: first, the object of s. 205 is as above stated; secondly, the circumstance that the duty is imposed on the judges of the High Court, persons occupying positions of great importance and dignity, to whom mandatory clauses would not be addressed without strong reason; thirdly, that, in fact, there is no provision whatever for imposing any penalty or deprivation of right on a litigant, if the High Court should neglect to comply with its judicial duty as laid down in the section. In other words, the duty is imposed on the judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The responsible persons—in this case the judges of the High Court—may be "blameable"—as Lord Blackburn observed in the instructive case of *Justices of Middlesex* v. *The Queen* (1)—but third parties have nothing to do with that.

If the sentence imposing the duty is only directory, as their Lordships think is clear for the reasons stated, an important consequence follows. It is a well settled general rule that "an absolute enactment must be obeyed or fulfilled "exactly, but it is sufficient if a directory enactment be "obeyed or fulfilled substantially": *Woodward* v. *Sarsons* (2); see also *Earl of Mountcashell* v. *Viscount O'Neill.* (3) It is sufficient if the plain object of the directory provision is carried out: *Walter* v. *Rumbal* (4); *Jarvis* v. *Hemmings.* (5)

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(1) (1884) 9 App. Cas. 757, 778.
(2) (1875) L. R. 10 C. P. 733, 746.
(3) (1856) 5 H. L. Cas. 937, 955.
(4) (1695) 1 Ld. Raym. 53.
(5) [1912] 1 Ch. 462.

If these principles are applied in the present case, it will be apparent that the following alternative view arises: either s. 205, in imposing on the High Court the duty of giving or withholding a certificate, is doing so only in cases where there is a reasonable possibility that the specified question arises or may arise, or, alternatively, the duty is one which need only be complied with in such a case. It is plain that in the vast majority of cases no such question can arise. It seems to their Lordships most difficult to believe that the Legislature was intending to lay on the judges of every High Court an obligation as part of their judicial duties to record their intention to "withhold" a certificate in such cases as an ordinary judgment on a criminal trial, or in a libel action, or a decree or judgment in an every-day case for the recovery of a trifling sum of money, for example, in a normal action for a debt. Their first duty is "to consider"; but only, it would seem, when there is in fact something to consider. Their Lordships have come to the conclusion that the duty imposed on the judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that the specified question may be involved.

The conclusions on this matter of the construction of s. 205 are accordingly these: First, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court. Secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court, and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. Thirdly, the section, on its true construction, is dealing only with cases where there is a reasonable possibility that the specified question may arise, and the duty is imposed on the judges of the High Court only in those cases.

Their Lordships desire to add that the case of *Errol*

Mackay v. *Oswald Forbes* (1) related to a case within the second of these propositions. The remarks of the Board as regards the duties of the judges of the High Court must be read as confined to cases of the nature which arose in that case; and in that connection reference may be made to the remarks of Lord Halsbury in *Quinn* v. *Leathem* (2) that every judgment must be read as applicable to "the particular facts "proved, or assumed to be proved, since the generality of "the expressions which may be found there are not intended "to be expositions of the whole law, but governed and "qualified by the particular facts of the case in which such "expressions are to be found." (3) It may be well to add that their Lordships do not differ from the opinion expressed in that case as to the duty of the judges of the High Court in a case to which the section is applicable to record a determination to withhold a certificate if they think that is the right course. Preferably that should be done by the judges who have heard the case; but it is not essential in every case, and may sometimes be impossible, for example, when there are two judges and they differ on the question whether the certificate should be given or withheld. It may be noted that in the *Errol Mackay* case (1) their Lordships provided for the event of the High Court making an order at some later date withholding the certificate in question, and that order, doubtless, could be made by judges other than those who delivered the original judgment.

It follows from the above observations that the preliminary objection fails, since in the present case there is no possible ground for thinking that any question, still less a substantial one, as to the interpretation of the Government of India Act, 1935, can be involved.

Two other matters were argued on the preliminary objection, first, whether a decision on a reference under s. 66, sub-s. 2, of the Income-tax Act is "a judgment, decree, or final order" within the meaning of those words in s. 205; secondly, whether the certificate given as above mentioned on June 17,

(1) (1940) L. R. 67 I. A. 64.
(2) [1901] A. C. 495.
(3) [1901] A. C. 495, 506.

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1935, under s. 66A of the Income-tax Act is not a sufficient proof that the certificate under s. 205 of the Government of India Act (if the section was applicable) had been withheld. On these two questions their Lordships do not think it necessary to express any opinion.

Coming now to the appeal by the bank, it may be observed that the High Court rightly appreciated that the question was ultimately one of fact, to be decided on the findings of the Commissioner under s. 66, sub-s. 2, of the Income-tax Act, and that the appellant bank had to establish either that the Commissioner had misdirected himself on some question of law, or that there was no sufficient evidence to justify his findings. Their Lordships note that the High Court, in deciding that neither of these points had been made good, examined and considered a number of cases, most of which related to insurance companies and banks. Their Lordships do not propose to attempt to reconcile all these decisions and the various dicta which are to be found in the reports of them, which might indeed prove to be an impossible task; and they will add that the cases relating to insurance companies largely turn on the nature of the insurance business actually carried on and the way in which reserve funds have been set aside and dealt with.

In the present case, it appears that on December 31, 1934, the value of the investments of the bank amounted to Rs.50,88,550, mainly held in Indian Government securities which, being readily saleable, could, if necessary, be promptly realized in order to pay claims. During the year 1935 some 10 lacs of these Government securities and some shares were sold, and the profit made, taking the differences between the cost price of the investments and the prices at which they were sold, was Rs.1,42,588. The grounds on which the bank contends that the profit of Rs.1,42,588 made on the sale of some of its securities in the year 1935 does not form part of the profits of its business of banking are succinctly stated thus, in the statement of the case: That the bank had treated the investments in shares and securities as a reserve for emergencies, and had resorted to their sale in the accounting period 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs.2,66,000 with the Reserve Bank of India under the provisions of s. 42, sub-s. 1, of the Reserve of India Act, 1934 (No. 11 of 1934). The bank claimed also that it did not "deal in shares and "securities," and that therefore the profit made by the sale of shares and securities was not taxable.

In the statement the Commissioner finds that up to 1933 there was no sale of securities. The first sale took place on November 30, 1934. On the other hand, he declines to accept the contention that the bank had to sell the securities in order to meet heavy withdrawals of deposits and to make the compulsory deposit with the Reserve Bank of India. He states from an examination of the books that it is clear that the profits realized by selling shares and securities were utilized in increasing the reserves. A general view of the financial position since 1932 as on December 31 of each year can be gathered from a table contained in the statement, which is as follows :—

Accounting year.	Assessment year.	Deposits in thousands.	Investments in thousands.	Total reserve in thousands.
		Rs.	Rs.	Rs.
1932 ...	1933–34 ...	11,543	4584	997
1933 ...	1934–35 ...	12,361	4931	1041
1934 ...	1935–36 ...	11,882	5088	1043
1935 ...	1936–37 ...	11,310	3859	1234

It is apparent that the decrease of deposits in the year 1935 as compared with the previous year is roughly 5 per cent., while the decrease in investments as between the two years is more than 20 per cent. So far from there being a finding that the sales of shares and securities were due to any special emergency, the Commissioner says that it is apparent that the bank had been selling the shares and securities in order to take full advantage of the high prices prevailing in 1935. He was of opinion that the bank had been "carrying on business in shares and securities since the "closing months of 1934." This may well be the correct view, and a sufficient ground for dismissing this appeal; but their Lordships do not wish to give any support to the contention that, in order to render taxable profits realized on sales of investments, in such a case as that before them, it is necessary to establish that the taxpayer has been carrying on what may be called a separate business either of buying or selling investments or of merely realizing them.

The principle to be applied in such a case is now well settled. It was admirably stated in a Scottish case, *Californian Copper Syndicate* (*Limited and Reduced*) v. *Harris* (1), and the statement has been more than once approved both in the House of Lords and in the Judicial Committee: see, for example, *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (2) Some dicta which appear to support the view that it is necessary to prove that the taxpayer has carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments are taxable, for example, the dicta in the case of *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co.* (3) cannot now be relied on. It is well established, to cite the exact words used in the *Californian Copper* case (1): "that enhanced values "obtained from realization or conversion of securities may be "so assessable, where what is done is not merely a realization "or change of investment, but an act done in what is truly "the carrying on, or carrying out, of a business." (4)

In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank, often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds, at somewhat higher rates of interest. But the banker has always to keep enough cash or easily realizable securities to meet any

(1) (1904) 5 Tax Cas. 159.
(2) [1914] A. C. 1001, 1010.
(3) (1931) 16 Tax Cas. 381, 388–9.
(4) 5 Tax Cas. 166.

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probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. If, as in the present case, some of the securities of the bank are realized in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words, that it is an act done in "what is truly the carrying on" of the banking business.

This, it appears to their Lordships, is the more appropriate and satisfactory ground for dealing with the question arising in the present case. It accords exactly with one of the findings in the statement of the Commissioner agreeing with the views both of the Income-tax Officer who first dealt with the case and of the Assistant Commissioner. He observed "that the purchase and sale of shares and securities "are so much linked with the deposits and withdrawals of "clients that, with the existing Articles of Association, the "purchase and sale of shares and securities are as much part "of the assessee's business as receiving deposits from clients "and paying them off are, and that, therefore, the profits "which arise from the former transactions are as much business "profits as the profits arising from the latter transactions "are."

There can be no doubt that there is ample evidence to justify this view, and in their Lordships' opinion, as in that of the High Court, it is sufficient to dispose of this appeal.

Their Lordships will accordingly humbly advise His Majesty that the appeal must be dismissed, with costs.

Solicitors for appellant: *Douglas Grant & Dold.*
Solicitor for respondent: *Solicitor, India Office.*

END OF VOL. AND OF APPELLATE SERIES FOR 1940.

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APPEAL CASES.

1940.—A.C.

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